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CIS

THE ANTITRUST EQUAL ENFORCEMENT ACT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 995

A BILL TO PROVIDE FOR CONTRIBUTION OF DAMAGES ATTRIBUTABLE TO AN AGREEMENT BY TWO OR MORE PERSONS TO FIX, MAINTAIN, OR STABILIZE PRICES UNDER SECTION 4, 4A, OR 4C OF THE CLAYTON ACT

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THE ANTITRUST EQUAL ENFORCEMENT ACT

WEDNESDAY, APRIL 22, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Dole and DeConcini.

Staff present: Peter Chumbris, antitrust counsel; Quentin Crommelin, Jr., staff director; Steve Cannon, antitrust counsel; and Marcy Tiffany, antitrust economist and counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

THE CHAIRMAN. The committee will come to order.

Today we will hear testimony on S. 995, the Antitrust Equal Enforcement Act of 1981. This bill, which adds a new section 4(I) to the Clayton Act, is designed to rationalize the process of allocation of damages in antitrust price fixing suits. The bill assures that the largest and most responsible price-fixers do not escape their share of liability, and that smaller and middle-sized businesses are not left responsible for the liability caused by another's wrongdoing.

Subsection (a) of this bill provides that any parties subject to liability as defendants in antitrust price-fixing cases may claim contribution from their coconspirators. The formula for computing each coconspirator's share of the total liability is based on the damages attributable to its own sales or purchases of the goods or services subject to the price fix. To effectuate its right of contribution, a defendant may utilize the procedural tools of the Federal Rules of Civil Procedure. A claim for contribution may be asserted by cross-claim, counter-claim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the entity from whom contribution is sought.

The bill also sets forth a process of claim reduction when some, but not all, defendants in a price-fixing case choose to settle rather than proceed to trial. To assist in this process, the bill sets forth clearly delineated alternative formulas under which the amount of such claim reduction may be easily computed.

I also think it is important to stress that subsection (d) of the bill makes it clear that the principles of joint and several liability will continue to apply to price-fixing suits.

When all the elements of S. 995 are combined, they inject a much-needed element of fairness into the process of determining who should be responsible for paying bona fide antitrust damages and in what amount. No longer will a defendant who chooses to defend itself rather than give in to settlement pressure be faced with the possibility of paying for the wrongs committed by others. In short, each member of a price-fixing conspiracy will be required to pay its fair share of the liability incurred and cannot escape the responsibility for its own acts.

Before we begin with the testimony, I want to note that when S. 995 was introduced on April 10, the name of Senator Orrin Hatch was inadvertently omitted from the Congressional Record as a cosponsor of the bill. I will have the permanent record corrected when the Senate reconvenes next week.

Today we are fortunate to have assembled a distinguished group of witnesses from the worlds of both business and law.

Our first witness is Hon. William F. Baxter, Assistant Attorney General in charge of the Antitrust Division of the Justice Department.

Professor Baxter, thank you for appearing before the committee twice in 1 week. I understand you have a pressing commitment at 11 to be sworn into your new position. I am sorry I shall not be able to be there; I would be there otherwise. Therefore, you may make an abbreviated oral statement if you would like to do so.

However, prior to that, I will call on the distinguished Senator from Arizona, Senator DeConcini, and ask if he has an opening statement.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeConcini. Thank you, Mr. Chairman. I will be brief for the same reason the chairman has indicated.

I welcome you, Mr. Baxter, and wish you well in your new position at the Antitrust Division in the Justice Department, which, in my judgment, is so vital to the continuation of the free enterprise system in this country.

I want to compliment the chairman for scheduling these hearings on S. 995, a bill that I have been actively supporting for the 4 years that I have been in the Senate. It is vital for small- and middle-sized businesses that in this particular class-action suit problem, which has blossomed and expanded immensely in the past decade, some relief be provided for small- and middle-sized companies, who very well may be innocent of the charges but yet under existing laws are required to take on the full burden in the defense and perhaps the full liability.

With that, Mr. Chairman, if you will agree, I will submit a statement for insertion in the record in full.

The Chairman. Without objection, that will be done. Also, Senator Baucus has a statement that I will place in the record.

Before we begin with the first witness I wish to place a copy of S. 995 in the record.

[Prepared statements of Senator DeConcini and Senator Baucus and a copy of S. 995 follow:]

STATEMENT OF SENATOR DENNIS DECONCINI

Contribution is designed to rationalize the process of the allocation of damages in an antitrust price-fixing suit, so that the largest and most responsible price-fixers do not escape their share or the liability, and so that smaller and middle-sized businesses which find themselves in the midst of a price fixing suit are not left responsible for the liability caused by another's wrongdoing. As we seek more effective enforcement of the antitrust laws against price-fixers in an effort to effectuate the central purpose of the antitrust laws, to provide consumers with better products at lower prices by maintaining competitive markets, and which ultimately encourage innovation and productivity, we must also assure fairness as among defendants, including those who may be at most tangentially related to the charged wrongdoing and who in fact may be wrongly accused. Laws which are legitimately designed to deter and punish wrongdoers should not be used to permit collusive settlements by the plaintiffs with the largest and often most culpable defendants, while extracting larger, or at least proportionately larger payments from smaller, often more vulnerable defendants.

Currently, an alleged price-fixer, under the principle of joint and several liability, is considered liable for the damages attributable not only to its own particular sales to the plaintiff or plaintiffs, but also for the damages attributable to the sales of all coconspirators. Accordingly, each defendant faces the possibility of liability for treble the entire damages caused by all defendants combined.

In many cases, defendants can arrange to enter into sharing agreements—usually based on relative sales—to apportion the liability among themselves in a way that will avoid grossly disproportionate payments by any one defendant. But it is clear that such sharing agreements are not always possible, especially in non-concentrated industries with numerous small and medium sized companies.

In cases where sharing agreements cannot be worked out, the effect of this open-ended liability on a smaller defendant who wishes to defend its innocence is to drive it into settlement, even if it believes that the risk of its being found liable is small. It also means that if one or more defendants settle a price-fixing case (for less than their proportionate share of the total liability) without persuading the plaintiff to agree not to seek treble damages with respect to the settling defendants' sales, those who remain in the litigation face the prospect of enormous liability since they would remain liable even for treble the damages caused by settling defendants, as well as their own, less the amount paid in settlement. Moreover, at least according to some authorities, a losing defendant is not only liable for the damages on all the conspirators' sales, but is also liable for damages on sales by a non-conspirator if, and to the extent that, the plaintiff proves that the prices of the sales of such non-conspirator were affected by the conspiracy.

The result is to allow plaintiff's counsel to settle relatively inexpensively with (or simply not sue) some defendants (usually the large and most responsible or those who want out as quickly as possible) and force the remaining defendants (often those who have the best case or are in the poorest financial position—usually the smaller companies) to settle at a higher rate rather than run the risk of huge liability for not only their own damages but also for the damages of those who opted out early and cheaply.

This bill will end the abuse of the early out defendant by relieving a defendant of the liability attributable to the defendants who settle and by allowing the defendant to seek contribution from those conspirators who do not settle (or who are not sued by the plaintiff). The defendant could do this in the same action or by instituting a separate action. As a practical matter, this would mean that in most cases (except, for example, where a co-conspirator was insolvent or not present in the United States), a losing defendant would be liable, in the end, only for damages caused by its own sales. This bill does not, however, change the principle of joint and several liability and thus would not impair the plaintiff's rights vis-a-vis any defendant. It would only affect the relationship among defendants by putting those defendants who cannot work out sharing agreements (usually the smaller companies in fragmented industries) on roughly the same litigation footing enjoyed by those who can obtain agreement (usually large companies in concentrated industries).

This right of contribution should not overly complicate antitrust price-fixing cases or cause the plaintiff to lose control over its case. In many cases as noted, parties would enter sharing arrangements, which are not affected by this legislation. In cases where the claim for contribution was brought as a cross-claim or by way of impleader in the main action, the plaintiff's claim would in no way be affected and the judge would have the discretion to sever or stay the contributor's claims to avoid complications if necessary.

In those situations where a defendant chose to pursue its right of contribution in a second action, the defendant would have to prove that the alleged co-conspirator, if not a party to the original action, was in fact a co-conspirator—however, that would be a problem among the defendants and would in no way affect the plaintiff's rights or complicate its lawsuit.

The restructuring of the manner in which damages are apportioned in an antitrust price-fixing suit will introduce added elements of fairness and rationality as well as detrerrence into the litigation process as a whole. No longer will a defendant who chooses to defend itself rather than bow to settlement pressure be left potentially "holding the bag." At the same time, as each member involved in the conspiracy will be required to pay its fair share of the liability, each defendant will be aware that it cannot escape the responsibility for its own acts and will behave accordingly.

I have been a strong supporter and a primary co-sponsor of this bill since it was first introduced in the 96th Congress. I feel that it is very important that this bill be passed as soon as possible, so that small and middle sized business will get the relief that they have so long deserved in this type of situation.

STATEMENT BY SENATOR MAX BAUCUS

Mr. Chairman, I want to thank you for holding these hearings on this important issue. My only regret is that pressing business in Montana precludes my ability to personally attend today. I'm delighted, however, to have an opportunity to submit this written statement for the record.

I support legislation that would allow a defendant in an antitrust suit to seek contribution from other alleged co-conspirators. I supported contribution legislation in the past Congress and I'm happy to be an original co-sponsor of the contribution legislation before us today. I thank the Chairman for introducing the bill and for his leadership on this issue.

Small businesses need this legislation. A serious problem faced by some small and medium sized businesses today is their liability as defendants in large antitrust suits. I believe that when a small business is involved in a large antitrust suit and is found guilty, it should be punished. Current law provides heavy penalties. Damages are trebled such that a guilty defendant would pay three times the actual damages that it caused. This is a good provision of the law. Price fixing is probably the most reprehensible type of antitrust violation, and our laws must be quick and decisive in inflicting punishment.

Unfortunately, however, current law goes one step further and I think one step too far. The small business found guilty of price fixing also can be forced to pay treble damages for the violations of every other business in the industry. This is because of the principle of joint and several liability. While this principle is useful as a deterrent to price fixing, it also discriminates against small businesses. Under the principle of joint and several liability, small businesses are liable for the treble damages and attorneys fees of an entire industry even if they represent only one or two percent of the whole market.

In many cases, a small business simply cannot pay the damages caused by the other co-conspirators and will be forced out of business. This result is too harsh. While it is important to punish lawbreakers and deter further violations, our penalties should not be so severe that they effectively drive small businesses out of existence. It seems to me that one of the underlying themes of antitrust law is to preserve and protect businesses that are small. This cannot be accomplished with punative measures that lead small businesses to bankruptcy or dissolution.

In addition, joint and several liability can cause small business to pay a higher rate of settlement than larger corporations. Antitrust suits are often settled by negotiations and unfortunately, businesses that are small usually must bargain from a position of weakness. The effect of joint and several liability is to allow the plaintiff to negotiate an inexpensive settlement with one defendant and force the remaining defendants, often a smaller business, to settle at a higher price. The small business will comply with the higher settlement rather than run the risk of litigation and liability for everybody else's damages. The bigger corporations will settle out because they can afford to and the small businesses will be left holding the bag. The small business, whose resources are limited and whose existence often depends on the good will of creditors, is caught in a "whipsaw" and has the choice of settling or losing its ability to secure financing.

A more serious problem with the doctrine of joint and several liability is its deleterious impact on businesses who are charged with violations of price fixing but are innocent. The total liability of the entire industry's damages trebled lend to innocent defendants being coerced into a settlement.

This situation is totally unfair and works against the central principle that we hold dear in our American system of justice, the presumption of innocence.

Many small businesses would rather admit guilt to a price fixing charge that they aren't guilty of simply to get out from under the threat of paying the trebled damages caused by the other indicted co-conspirators. Furthermore, the cost of litigation alone can prevent a small business from having its day in court.

During hearings held on this bill during the last Congress, situations were brought to our attention where small businesses suffered this injustice. I understand that today further testimony will be presented by these small businesses. I welcome the opportunity to learn more about how some small businesses are being victimized by our current antitrust laws,and I look forward to working out solutions to their problems.

Hopefully, extensive discussion by our distinguished witnesses today will help us focus on solutions. Such testimony from these hearings will provide us direction for appropriate legislation to correct problems with our nation's antitrust laws.

Again, I want to thank the Chairman for his leadership on this important issue and I am happy to be a co-sponsor on legislation that addresses these problems.

97th CONGRESS
1st Session

S. 995

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

IN THE SENATE OF THE UNITED STATES

April 10 (legislative day, February 16), 1981

Mr. Thurmond (for himself, Mr. Baucus, Mr. DeConcini, Mr. Heflin, and Mr. Laxalt) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

The CHAIRMAN. Professor Baxter, we will now be glad to hear from you.

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY TAD LIPSKY, DEPUTY ASSISTANT ATTORNEY GENERAL FOR POLICY PLANNING AND LEGISLATION

Mr. BAXTER. Thank you, Mr. Chairman.

I am pleased to be able to be here this morning to present to you and to the committee the present views of the Justice Department on S. 995. I have submitted a written statement to the committee and will not attempt to repeat all of its contents. In the few minutes I have this morning I would say only the following:

Basically, we think that a contribution bill and a claims reduction bill should be passed. We certainly support in concept S. 995.

As we have worked on this problem, however, we have found that the more we work on it, the more complicated the problem becomes.

The problem is easiest in some ways where the defendants have been involved in more or less classical cartel activities so that the fair share of each defendant is estimated with some reasonableness by sales volume. However, there is a wide variety of antitrust violations—including, numerical by, I believe, the preponderance of treble damage litigation—that do not involve classic cartel activities.

The legitimacy of the contribution or claims reduction concept applies in our view to an even greater extent in these nonclassic cartel cases than to the classic cartel cases. I say that because I think it is true that a claims reduction or contribution concept inevitably diminishes to some extent—perhaps I should not say inevitably, but I would say it probably diminishes to some immeasurable and not very substantial extent—the deterrence that the treble damage remedy poses.

Now I do not suggest that is a critical problem. It would not keep me from supporting the application of these concepts to classic cartel situations necessarily. However, certainly it is the classic cartel situation where the deterrence is the most needed and the most justified. In these other cases—dealer termination cases, the submission of complementary bids, and a whole variety of other types of cases which are heavily represented among the private treble damage cases—deterrence is less needed and therefore these approaches seem to me even more warranted.

However, as one attempts to deal with anything other than the classic cartel case, the difficulty of saying what the fair share of that other defendant really is and finding some proxy with which to measure it becomes very great.

Mr. Chairman, we would like an opportunity to work further with this set of concepts. We think it is important. We will work on it. However, as a consequence of the difficulties we have seen, I would have to say that we really are not prepared at this point in time to give an unqualified endorsement to S. 995.

I do regret that I have to run off this morning. I would like to introduce my deputy who will be able to stay and answer any committee questions that there may be. Mr. Tad Lipsky is here at the table with me.

I am very proud of this particular deputy. He was one of the best students I had in my antitrust class. He was one of the best students I had in my regulated industries class. I even managed to sit on his Ph. D. dissertation committee in the Department of Economics at Stanford University. I regard it as a compliment to me that he was willing to come to the Justice Department with me a month or so ago.

The CHAIRMAN. Thank you very much. Did you want your entire statement to go into the record?

Mr. BAXTER. The written statement that we submitted, Mr. Chairman? Yes, sir, I would.

The CHAIRMAN. Without objection, that entire statement will go into the record following your oral presentation.

We will now excuse you and hope you have a successful swearing-in.

Mr. BAXTER. Thank you, Mr. Chairman.

The CHAIRMAN. Good luck to you in your important position. I do have one question here, Professor Baxter, if you have time for just one question.

Mr. BAXTER. Yes, sir.

CONTRIBUTION

The CHAIRMAN. Your testimony clearly sets forth the concerns you have about contribution, and I can understand your desire to have additional time to study this issue because it is a very important issue. In all likelihood this committee will have another day of hearings on S. 995 sometime around the middle of May. Could you appear before us at that time with somewhat more specific resolutions of the questions that you raised today?

Mr. BAXTER. I certainly would be delighted to appear, Mr. Chairman. I am sure we will have made more progress at that point in time.

The CHAIRMAN. Thank you.

Mr. BAXTER. As with any project of this kind, I am terribly reluctant to promise that we will fully have worked out all of the problems we see, but we will do the best we can.

The CHAIRMAN. Thank you.

Mr. Lipsky, you can remain longer, can't you, and be available for any questions that may arise during the hearing?

Mr. LIPSKY. Yes.

[Prepared statement of Hon. William F. Baxter follows:]

PREPARED STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Mr. Chairman and members of the Committee: I am pleased to be here today to present the views of the Department of Justice on S. 995, legislation which would provide for contribution among defendants in antitrust litigation. In the past few years this issue has been much debated within the antitrust bar, and before the federal courts and this Committee. In light of the importance of the private damage action remedy to effective antitrust enforcement, the Justice Department has actively participated in this debate. I hope that my testimony today will further assist the work of the Committee in this important area.

The complexity of this question is reflected in the wide divergence of views on the subject. The ABA Antitrust Section's Task Force on Contribution, after considerable study of the issue, issued both majority and minority reports which differed significantly in their conclusions. 1/ One scholarly article that mildly opposed the contribution proposals 2/ is about to be contradicted by an equally scholarly article. 3/ The United States Courts of

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1/ ABA, Report of the Civil Practice and Procedure Committee to the Section on Antitrust Law Regarding Rights of Contribution Among Antitrust Defendants (1979).

2/ Easterbrook, Landes, and Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980).

3/ Polinsky and Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis (article forthcoming in Stan. L. Rev., 1981).

Appeals have split 4/ on the legitimacy of allowing contribution in antitrust cases, and the Supreme Court only last month heard argument on the issue. 5/ And, of course, as the Committee knows, its hearings on the subject during the last Congress produced widely divergent opinions and recommendations from many quarters. 6/

It is therefore most appropriate for this Committee to hold hearings on the issue. After all, what appears to be the general rule against contribution in antitrust was not the result of a considered decision by Congress, but of the less intentional adoption of common law doctrine denying contribution in tort cases; doctrine that has since been generally abandoned by the states and the Federal Government with respect to unintentional torts. While some federal courts have independently evaluated the merits of contribution and claim reduction in antitrust cases, in the absence of congressional direction most courts have adhered to general common law contribution doctrine.

4/ *Compare* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) *with* In re Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir. 1979), *cert. dismissed*, No. 79-972 (Oct. 20, 1980) *and* Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979).

5/ Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (argued March 3, 1981).

6/ Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).

Let me therefore trace the development of that doctrine briefly. From the 18th Century, 7/ the English courts refused to intercede to help one intentional wrongdoer in a dispute with another involving how the benefits or obligations arising from their wrongful conduct should be apportioned. The early case of Merryweather v. Nixan 8/ intimated, however, that contribution could become available where the underlying tort was not intentional. This distinction--providing for contribution for unintentional torts and denying it for intentional violations--was embodied in the established English rule.

As American courts looked to the English common law, however, this distinction was not recognized, and contribution was denied in all tort cases. This rule was adopted by the vast majority of state courts, and as federal common law by the Supreme Court as well. 9/

Over time, the rule changed, particularly with respect to unintentional torts. This change may have been due to the perceived unfairness of allowing one of several defendants of equal responsibility to bear the entire burden of damages as the

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7/ In 1725, in the famous Highwayman's Case (Everet v. Williams), reported in 1893, 9 L.Q. Rev. 197, one highwayman sued another for an accounting of their loot. The bill was dismissed, the plaintiff's solicitors were fined fifty pounds each for contempt, and the plaintiff and defendant were hanged.

8/ 1799, 8 Term. Rep. 186, 101 Eng. Rep. 1337.

9/ Union Stockyards Co. v. Chicago, B.& Q.R.R., 196 U.S. 217, 224 (1905).

result of chance, spite, or collusion. It may also be viewed as part of the developing jurisprudential concept that tort damages were intended to spread as widely as possible the losses resulting from injury. In any event, state legislatures began adopting laws permitting or requiring contribution among unintentional tortfeasors, and even, in a few instances, among intentional tortfeasors. Today, the majority of states have contribution statutes. 10/

The trend in federal law towards permitting contribution has been more limited. Where federal courts have had to consider tortious conduct in nondiversity settings they have been disposed to follow the emerging state law trend towards permitting contribution. 11/ Federal contribution rules have also developed in admiralty and in securities law. The common law rules governing admiralty cases have provided for contribution since ancient times, 12/ while in securities cases, contribution has been

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10/ See state statutes collected in S. Rep. No. 96-428, 96th Cong., 1st Sess. 12-13 (1979).

11/ See, e.g., Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967) (court adopts contribution for negligence cases arising in Virgin Islands).

12/ At first, the Supreme Court refused to fashion independent contribution rules for admiralty cases in the absence of legislation. Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, 285 (1952). The Court later decided, based on the historical differences between the common law and admiralty law, that it was appropriate to provide contribution in admiralty without waiting for congressional action. Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106, 110-11 (1974).

permitted by statute or implied from comparable statutory provisions. 13/

In antitrust cases, as with most federal causes of action, courts have generally denied rights of contribution. 14/ While one court has recently held that contribution may be sought in antitrust cases, 15/ most have continued to disallow such claims for various reasons, including concern with effects on deterrence and on the workability of private antitrust litigation, and the absence of clear congressional authorization of such a remedy in light of traditional common law contribution doctrine. 16/ The issue is now before the Supreme Court. 17/

The reasons for the intense current interest in contribution in antitrust cases do not entirely parallel those arising in other tort contexts. As it would be applied in antitrust, contribution involves unique considerations that reflect the special

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13/ See, e.g., Section 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f), and Sections 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(b).

14/ See, e.g., El Camino Glass Co. v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 248 F. Supp. 1339 (S.D.N.Y. 1969).

15/ Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., supra note 4.

16/ See, e.g., In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-972 (Oct. 20, 1980); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979).

17/ Texas Industries, Inc. v. Radcliff Materials, Inc., supra note 5.

nature and problems of antitrust damage litigation and its particularly close relationship to public antitrust enforcement.

The current interest appears to arise from two differing concerns. The first involves the equitable distribution of responsibility for antitrust damages; this concern is similar to those that exist in the tort area generally. Because liability is joint and several, plaintiffs may proceed against any combination of co-conspirators--one, some, or all--and may likewise recover damages in any proportion from those defendants against whom they obtain a favorable judgment, regardless of the defendants' relative culpability, benefit derived, or ability to pay. Defendants required to pay more than their proportionate share of antitrust damages have no recourse against co-conspirators who have not been sued or who have not been fully levied against by plaintiffs. Theoretically, the result may be that one or a few of the defendants must satisfy all of the damage claims while other culpable co-conspirators are never called to account. Concern with such a situation apparently led the Eighth Circuit to look favorably upon contribution in Professional Beauty Supply. The second concern is more uniquely related to antitrust damage litigation. Although each defendant in an antitrust action is legally liable for the full amount of the plaintiffs' claims, defendants undoubtedly perceive their real exposure in light of the probability that their co-defendants also will be required to pay some share of the damages ultimately awarded to the plaintiff. Under current antitrust doctrine, when a defendant settles with a plaintiff, only the actual amount of the settlement is deducted from the plaintiff's claim against the remaining defendants. 18/ If the settlement is for a nominal amount, the remaining defendants may perceive an increase in their exposure to the remaining liability and will feel additional pressure to settle. 19/ Thus, the current rule is said to create a competition among defendants in which all defendants are forced to settle on unfavorable terms. This possibility has been characterized as unfair, since the relative percentage of the total liability paid by a given defendant is likely to depend more upon its place in the settlement queue than upon its relative culpability. In extreme cases, it is said that totally innocent defendants have been forced to pay to avoid the risk of enormous liability.

Simply stated, contribution would allow a defendant required to pay more than his proportionate share of damages to recover from other co-conspirators the excess amount paid, up to their proportionate shares. In addition, the legislation being considered by this Committee would provide that where a plaintiff had settled an antitrust claim with a defendant for less than that defendant's proportionate share of the damages, the plaintiff's claim against the remaining defendants would be reduced by the amount of the settled defendant's proportionate share,

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18/ Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

19/ *See* Easterbrook, Landes, and Posner, *supra* note 2, at 353 et seq.

rather than the amount of the actual settlement, as it would be under current law. The perceived merit of this proposal is that it would eliminate the potential for unfairness that I have just described.

However, the most casual analysis of the effect of contribution and claim reduction leads one to the conclusion that the elimination of this unfairness can be purchased only at a price. This price includes at least the administrative costs associated with litigating the propriety of contribution in particular cases, as well as the costs implicit in giving the courts yet another class of decisions to render. Less clearly, the price may--and I stress "may"--involve a reduction in the deterrence of antitrust violations. The Antitrust Division must consider this effect on deterrence with greatest care. From the enforcement perspective, the private damage action is an important complement to our own civil and criminal prosecutions. While individuals contemplating antitrust violations are likely to be concerned primarily with the threat of criminal conviction and incarceration, the threat of treble damages can lead firms to undertake significant preventative measures. The Division would object strongly to any material reduction in that threat.

Unfortunately, the effect of contribution on deterrence is difficult to gauge. Looked at from an "ultimate liability" perspective, contribution and claim reduction can be argued to have both positive and negative effects on deterrence. Theoretically, a firm might join a conspiracy in the hope that it never will be sued, or, if sued, that it will be able to settle with the plaintiff for a sum that makes its illegal behavior economically attractive from an overall standpoint. To the extent that contribution helps ensure that a firm that participates in a conspiracy will be called to account--by a co-conspirator if not by a victim--contribution might be argued to assist deterrence. This effect may predominate if the firm's concern for its goodwill, or the individual's concern for his job and reputation, makes the fact of antitrust liability rather than the size of the judgment the primary consideration.

On the other hand, the no-contribution rule poses for each co-conspirator the risk of liability for all the conspiracy's damages times three. Adoption of a contribution and claim reduction proposal removes this risk. Thus, deterrence may be reduced by contribution, if the magnitude of liability is the primary consideration.

Obviously, one cannot be definitive in predicting which of these effects would be stronger in a given instance. However, to the extent that firms are risk averse--a proposition that produces endless debate among scholars--a rule denying contribution and claim reduction should have the greater deterrent effect. Risk averse firms should be more deterred by the possibility of paying an incalculably large damage award than by an increased likelihood of having to satisfy a more modest claim. Thus, I believe that in cases in which the social desirability of deterrence cannot be doubted--cases involving clear, horizontal cartel-type violations--ultimate liability deterrence considerations generally argue for a no-contribution rule.

It is bad enough that one cannot be definitive in predicting the ultimate liability deterrent effects of contribution in a given instance. Unfortunately, calculating the possible effects of contribution and claim reduction on deterrence is even more complex, due to even more subtle and debatable effects on the dynamics of litigation and settlement.

It is important to note that the complexity of contribution in antitrust will affect not only the overall deterrent effect of private antitrust litigation, but perhaps even more significantly, the costs of litigating those private cases that are brought. Both effects--on deterrence and on the costs of private antitrust litigation--depend to a significant degree on the specific rules adopted for applying contribution.

As I mentioned earlier, the current rule is that only the actual amount of a settlement is deducted from the liability of the remaining defendants. Under this system, if a defendant settles for less than its proportionate share of total damages, the nonsettling defendants remain liable for the difference. This in turn increases the pressure on these defendants to settle and, whether or not settlement does occur, leads to possible inequities in ultimate responsibility for the payment of damages.

Theoretically, the settlement problem can be handled in two basic ways. One is to continue the current practice of deducting only the actual amount of the settlement from the remaining total liability, but to permit nonsettling defendants to sue the settling defendants for their contribution shares. The other is to deduct from the liability of the nonsettling defendants a settling defendant's hypothetical contribution share, or the actual amount of the settlement, whichever is greater.

The first method has been regarded as unacceptable because it severely discourages settlement. It does this by placing each defendant in a position where he may lose but there is nothing to gain by settling. If he litigates and loses, the most he will be liable for is his contribution share. If he settles for less than his contribution share, he may be sued later by nonsettling, unsuccessful defendants for the difference between his share and his settlement. But should the plaintiff lose on the merits against remaining defendants, the settling defendant cannot recover his payment.

There are ways to limit the exposure of settled defendants, such as conditioning recoveries against them to instances in which it can be proved that they settled in bad faith. This approach was adopted in the 1955 Uniform Contribution Among Tortfeasors Act. However, experience with this approach has confirmed what logic suggests: it effectively discourages settlements. 20/ Given the strong interest in encouraging fair settlement of antitrust cases, such an approach would be unacceptable.

20/ *See* Uniform Contribution Among Tortfeasors Act (12 U.L.A.) § 4, Commissioners' comment *b* at 99-100 (1975); Easterbrook, Landes, and Posner, *supra* note 2, at 334 nn. 9 & 11.

The alternative settlement system--reducing a plaintiff's recoverable claim by a settling defendant's hypothetical contribution share--also has its problems. While it reduces the settlement "snowball" effect I spoke of earlier, it too may inhibit settlement. With each settlement, a plaintiff gives up the chance to recover the settling defendant's contribution share of total damages. If a plaintiff could calculate that share accurately, it could then settle with a defendant if the amount appeared adequate. But if a plaintiff cannot calculate the share, it may shun settlements because of the risk of giving up an unknowable proportion of its total claim.

Clearly, the plaintiff's certainty in this respect depends critically on the method chosen to calculate contribution shares. The most straightforward method is the "pro rata" or "equal shares" method, where total liability is divided by the number of liable defendants to determine an equal contribution share for each. Comparative fault is a slightly more sophisticated method of computing contribution shares. Each defendant's relative culpability must be computed and total liability divided accordingly. Comparative benefit is still another method of computing contribution shares. Each defendant's relative benefit from the violation is determined and total liability appropriately divided. Comparative benefit is not widely used elsewhere, but that is the approach most frequently suggested for determining contribution shares in antitrust litigation.

Unfortunately, in selecting among these approaches, certainty appears to be gained only at the expense of the fairness considerations that prompt consideration of the basic concept of contribution in the first place. For example, pro rata contribution affords a high degree of certainty but may operate quite inequitably. In some cases the pro rata method produces a rough justice that may be more equitable than no contribution at all, and there may be some antitrust cases in which a pro rata contribution share would be appropriate. The Eighth Circuit in Professional Beauty Supply opted for a pro rata contribution share computation. The pro rata method, however, can produce inequitable aberrations in other cases. The comparative fault method is particularly appropriate in noneconomic tort cases where no benefits have been derived by the defendants, or where the benefits bear no relationship to the damage suffered by the plaintiff. This is not generally the case in antitrust; it fares badly on both certainty and equity grounds.

While in many antitrust cases the comparative benefit method seems to be the most equitable way of determining contribution shares, the appropriate measure of the benefits received by defendants could vary drastically with the factual situation. Consider the percentage-of-sales test as an example. While this has some appeal in textbook-perfect, horizontal price-fixing conspiracies, it may produce bizarre results even in that situation. For example, some members of bid-rigging conspiracies never win a bid but rather receive pay-offs in exchange for losing bids; they have neither purchases nor sales. Other antitrust cases, including particularly the frequent complaints against agreements between parties at different distribution levels, also present situations in which benefits received could not be measured by percentage-of-sales or any other simple calculation. Moreover, any pure comparative benefit system excludes consideration of relative culpability, even in cases where it is clear that one party was the main force behind a conspiracy.

The most flexible approach would be to leave the method of determining contribution shares to the equitable discretion of the court. While this would probably achieve the highest attainable degree of fairness, it would also place the maximum uncertainty in the path of settlement, with concomitant effects on the judicial process. Alternatively, a specific method of determining contribution shares could be included in legislation, but as we have seen, no one method will work well in all cases.

Even if a precise formula for calculating contribution shares of settling defendants were adopted in legislation or developed through case law, the facts that must be plugged-in to that contribution formula will be hotly contested between plaintiffs and nonsettling defendants. Nonsettling defendants will try to shift as much liability to settling defendants as possible, while the plaintiff tries to preserve as much of the recoverable claim as possible. The actual amount of a settling defendant's contribution share may remain unresolved until after full discovery and trial. Thus, with claim reduction, plaintiffs will face considerable uncertainties when contemplating settlement and may be more reluctant to settle, even with eager defendants, than they are today.

Defendants also could become more reluctant to settle under a claim reduction rule. Contribution is a right that one defendant has against other jointly and severally liable defendants for damages growing out of the same cause of action. Thus, contribution doctrine requires that before a settled defendant's contribution share can be deducted from remaining damages, it must be established that he would have been liable for those damages had he not settled. However, avoidance of such a determination of liability is presumably one of the reasons why defendants wish to settle in the first place. Under some state contribution statutes, it is necessary to implead settled defendants in order to determine their liability. Once again, this precludes any defendant from buying peace. However, even if settling defendants are not impleaded, they may be placed at a tactical disadvantage in subsequent treble damage actions if their liability in a pending case is fully litigated in their absence. Thus, defendants would have an incentive to litigate their liability in the main antitrust action, rather than have it litigated in their absence.

All in all, it appears that even the claim reduction method is likely to inhibit settlements, thus increasing the cost of bringing and defending treble damage cases, probably reducing their number and perhaps reducing to some incremental extent their deterrent effect. However, a dampening effect on settlements is not entirely without its blessings; to the extent that diminished prospects for a quick settlement discourage the filing of totally nonmeritorious cases, so much the better.

In fact, I suspect that damage cases with merit would continue to be brought under a claim reduction rule, notwithstanding the sorts of problems that we have been discussing. Thus, while our analysis indicates the possibility of some adverse effects on deterrence, increased settlement and litigation complexities under contribution and claim reduction would probably impact more directly on costs of antitrust litigation than on deterrence.

As we have seen, rights of contribution and demands for claim reduction would complicate private antitrust litigation through multiplication of claims and inhibitions on the settlement process. Difficult questions, such as how to calculate contribution shares, would generate new topics for discovery and litigation. Under proportionate share claim reduction, plaintiffs must participate directly in determinations of settled defendants' contribution shares lest remaining recoverable damages be inordinately reduced. Both settled and nonsettled defendants may confront increased demands for discovery related to contribution and claim reduction issues. And the courts will be called upon to referee all of these disputes. In short, contribution and claim reduction are not free: they portend additional litigation costs in an area in which litigation costs are by unanimous agreement already too high.

In my judgment, some fairly hard thinking is necessary as to the situations that would justify incurring the costs of implementing contribution. I would be least willing to accept those costs where the behavior in question is clearly harmful and clearly illegal, where the violation is covert and therefore not readily detectable by its victims, and where the violation was undertaken with conscious disregard for the law. I am thinking here of the basic cartel violations--horizontal price fixing, market division, or customer allocation. In such cases, the risk to deterrence is at its maximum, while the need to eliminate unfairness is at a minimum. In the same spirit as the early English cases, it seems to me that with respect to that class of cases and for that sort of defendant against whom the Antitrust Division would routinely seek severe criminal sanctions, although typically stopping short of hanging, tying up the courts to adjudicate honor among thieves is at least a questionable use of judicial resources.

Even with respect to cases alleging clearly unlawful behavior, of course, arguments are sometimes raised by those claiming to be innocent that they cannot afford the risk of trial because of the no-contribution rule. As attractive as these arguments are in some situations, however, I think we must candidly assess the frequency with which such situations occur and the possibility that other remedies, perhaps the use of sharing agreements, may be equally effective before accepting them as a justification for the costs of allowing contribution in all cases. It seems somewhat unlikely that plaintiffs typically would adopt strategies that leave the least culpable defendants, particularly those with the least ability to pay, to withstand the bulk of the damage liability after settlement by others. Nonetheless, the plight of the "innocent defendant" evokes sympathy.

Outside the area of flagrant cartel behavior, the balance among all of the considerations involved--fairness among defendants, deterrence, and the increased costs of administering justice--is more subtle. A stronger case for contribution clearly exists. My inclination would be to allow contribution in some situations, but not in others, if the costs of allowing contribution can be kept at an acceptable level. However, how one draws the appropriate line is by no means obvious. And even if such a line could be drawn, the added costs of determining which regime to apply must also be considered.

Contribution is least attractive in cases in which the defendants have engaged in knowing, clear-cut violations of the law, and a correlation to criminal prosecution is suggested. Since indictment alone should carry no adverse consequences under our most basic concepts of justice, criminal conviction theoretically might be used to deny rights of contribution. However, there are significant problems with this approach. Criminal conspiracies often involve numerous defendants. How would contribution be handled in cases with a potpouri of convicted and acquitted defendants, as well as some who have pled nolo contendere or escaped indictment entirely? And given the time consumed by the criminal trial and appellate processes, possible contribution obligations would be difficult to predict until perhaps years after damage litigation had begun, significantly inhibiting settlement and leading to substantial litigation costs in the interim. This latter point emphasizes the importance of determining the availability of contribution early in litigation.

How might such a determination be made? It might be possible to develop a list of the types of antitrust cases in which contribution would not be available, such as horizontal minimum price fixing and market division. Unfortunately, this concept is also problematic. Given the vagaries of complaints, proofs, and verdicts, violations found do not necessarily match violations alleged.

To summarize, I find the contribution problem to be enormously complex. While contribution is a logical solution to inequities and abuses that many perceive in private antitrust damage litigation, it may have some adverse effect on deterrence, could complicate and substantially increase costs in many cases, and thus may be inappropriate in certain types of cases. While my predisposition is to favor some type of contribution legislation, I am reluctant to endorse contribution legislation such as S. 995 at this time. I have not sufficiently done my homework and I am not aware that anyone else has done it for me. I think it most important to develop a full understanding of the extent of the problems that exist without contribution, and of those that would exist with it. Before passing legislation to allow contribution, we should be confident that the solutions have acceptable costs. We look forward to working with the Committee and its staff to try to find such solutions and to develop equitable, cost-effective contribution legislation.

Mr. Chairman, this concludes my prepared presentation. I would be happy to respond to any questions the Committee may have.

The **Chairman**. We will now call the former Attorney General of the United States, Griffin Bell, to come take the stand. We are delighted to have him with us. He is one of the ablest men who ever served as Attorney General. He is now back in the private practice of law.

I believe your firm is King & Spalding in Atlanta. It is one of the leading law firms in America, isn't it, Mr. Bell?

Mr. **Bell**. Mr. Chairman, I can't deny that. [Laughter.]

The **Chairman**. And one of the most lucrative?

Mr. **Bell**. Having to pay a lot of taxes, I'd say that.

The **Chairman**. We are honored to have you with us. We appreciate your presence here. We would be delighted to hear from you. If you want to put your entire statement in the record at this time or if you prefer to deliver it in person, please proceed in any way you wish to present your testimony.

STATEMENT OF GRIFFIN B. BELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES, LAW FIRM OF KING & SPALDING, ATLANTA, GA.

Mr. **Bell**. Thank you, Mr. Chairman and Senator DeConcini.

My statement is not too long. I think I will just read it so that it holds together better.

I appreciate the opportunity to testify this morning in support of the Antitrust Equal Enforcement Act of 1981, S. 995. This bill would change existing antitrust law to provide for contribution among conspirators in a price-fixing scheme. It would also provide a so-called carve-out formula, which would reduce the trebled damages in a price-fixing case by the amount attributable to the sales or purchases of any settling defendant.

I strongly support S. 995, and I urge the committee to give it favorable consideration. I can say that Senator Thurmond and the other members of the committee have done a service to the country by giving such careful and thoughtful attention to this complex and important legal issue.

I begin with the proposition that the question of whether contribution should be allowed in price-fixing cases is one for resolution by Congress, and not by the courts.

Mr. Chairman, I notice that in the recent argument of the *Texas Industries* case in the Supreme Court the Solicitor General of the United States took this very position—that it was a matter that ought to be left to Congress.

The policies at stake in the resolution of this issue run very deep in the antitrust laws. The courts, quite properly, would attempt to resolve this issue within the context of longstanding common law doctrines that have been transplanted into antitrust. The issue of contribution, however, is of such significance of antitrust law that a case-by-case resolution of this issue, in reliance on doctrines developed long ago for other purposes, would be inadequate. Congress should set down the specific rules in S. 995 for the courts to follow.

Right here I think I just heard Assistant Attorney General Baxter testify that he thinks the issues are very complex. I think that Congress sometimes overdoes the worry over complexity by making statutes too complex. If you pass a law, this bill in its present form, the courts are perfectly capable of resolving the complexities. The courts often have to work out something, just as the common law evolved.

With a simple statute, the courts are capable of accommodating it to the problem. That is what it really gets down to. If you make it too complex, oftentimes it will not be passed or it will cause more trouble than you thought when you passed the statute. That is just an aside.

Under existing law, each member of a price-fixing conspiracy is liable for three times the damages caused by all of the conspirators combined. In the typical class action, potential damages run into the hundreds of millions or even billions of dollars. While sound antitrust policy demands ample deterrence against price fixing, which is why violation of the law is a felony, it was never intended that the penalty should be confiscation of a defendant's business. Yet, this is the very risk which a nonsettling defendant faces today, and it is this risk which effectively takes away the trial option from an innocent company in an industry dominated by price fixers. The fundamental unfairness of the existing system is the reason why I so strongly support the pending legislation.

The need for the enactment of S. 995 has been shown fully in the report of the committee on S. 1468, the predecessor of S. 995, during the 96th Congress. Therefore, with the permission of the committee, I will direct my testimony this morning to certain objections that have been raised against S. 995. After careful consideration, I have concluded that none of these objections is meritorious.

The first objection made to permitting contribution among price-fixing conspirators is that this would increase the complexity of antitrust litigation. I do not believe that contribution would materially add to the existing complexity of price-fixing litigation. In any event, the trial judge can order separate trials of contribution actions and can award damages to the plaintiffs before hearing the contribution claims among the defendants. Even if this were not true, however, the present legal rules prohibiting contribution are unjust, and an unjust situation cannot be allowed to continue merely because correcting it would be complicated.

The second objection to allowing contribution is that it would reduce the deterrence to price fixing. I disagree. The treble damages based on a defendant's own market share afford a sufficient deterrent to price fixing. More importantly, the best deterrent to price fixing is vigorous criminal prosecutions by the Antitrust Division of the Justice Department.

Objections have also been raised against the carve-out formula in S. 995. The clearest and most reasoned statement of these objections, I think, is in the supplemental views of Senators Kennedy and Metzenbaum which accompany the report of the committee on S. 1468 in the 96th Congress. With deference to these Senators, I have concluded that the objections to the carve-out formula in S. 995 are not sound, given the lack of fundamental fairness in the present system and the need for correction.

The principal objection to the carve-out formula is that it will reduce the plaintiffs' incentive to enter into settlements, because under the carve-out formula a settlement will reduce the defendants' total liability by an amount greater than the amount paid in settlement to the plaintiffs.

I disagree with this objection. The actual effect of the carve-out formula will be to encourage plaintiffs to settle for amounts that approximate the actual treble damages attributable to the settling defendants. Where the plaintiffs receive in settlement an amount comparable to the treble damages attributable to the settling defendants, the carve-out formula in S. 995 will have no effect on the total liability of the defendants to the plaintiffs.

S. 995 will tend to prevent so-called sweetheart settlements, where a defendant settles with the plaintiff for a mere fraction of the treble damages attributable to that defendant. Under the carve-out formula, a sweetheart settlement would, in fact, significantly reduce the total liability of all defendants to the plaintiffs, because the amount subtracted from the total liability would be in excess of the amount paid in settlement by the settling defendant.

Certainly, in any settlement the plaintiff accepts less than his claim against the defendant in exchange for elimination of the risk that at trial the jury will return a defendant's verdict. To the extent that the plaintiffs in a price-fixing case accept in settlement less than the treble damages attributable to the settling defendant, then their total claim against all defendants would be reduced. But, this is inherent in the nature of compromise. In exchange for accepting a lesser amount in settlement, the plaintiffs avoid the risk that they might eventually receive nothing at all.

Finally, it has been said that the carve-out formula in S. 995 would require a court to determine that a settling defendant had, in fact, conspired to fix prices, and that this determination would be a prerequisite to the reduction of the plaintiff's claim pursuant to the formula.

Nothing in the language of S. 995, however, appears to me to support this proposition. As I understand S. 995, once a plaintiff and defendant have entered into a good faith settlement, the court must apply the carve-out formula ipso facto and reduce the plaintiff's total claim against the other defendants by an amount based, in virtually all cases, on the sales or purchases of the settling defendant. In fact, S. 995 carefully avoids introducing the question of culpability into either the award of contribution or the application of the carve-out formula. The bill presupposes that the question of culpability will have been earlier determined. I think that is clear from the first sentence in section (*a*).

I would recommend to the committee only a single change in S. 995. The bill as now written applies only to price-fixing cases that are brought after it becomes law. Yet there are cases now pending that should be subject to this bill. S. 995 is designed to correct a serious injustice, and the injustice is equally present in pending and future cases. There is no constitutional prohibition against making S. 995 apply to pending cases since S. 995 concerns only the remedy for price fixing. In fact, Congress has made many statutes in the past applicable to pending cases.

The provisions of S. 995 may well lead to settlement of pending cases with the result of a lesser caseload in the courts and some modicum of economic stability in the business community at a time when the Nation badly needs it.

In conclusion, Mr. Chairman, I reiterate my strong support for S. 995. I would be happy to answer any questions that members of the committee may have.

Thank you.

The **Chairman**. Judge Bell, thank you very much for your fine statement. I have just a few questions here.

Mr. **Bell**. All right.

The **Chairman**. Judge Bell, S. 995 and its predecessor in the 96th Congress, S. 1468, have provoked much debate on the effect contribution will have on the deterrent value of antitrust damage claims. Those that believe contribution will actually increase deterrence argue that it will help insure that all participants in a price-fixing conspiracy would be held accountable for at least some damages, either by the plaintiff or by another coconspirator. On the other hand, the argument is made that contribution would decrease deterrence because it would eliminate the threat that each coconspirator could be held liable for treble damages caused by all conspirators in a given case.

As reflected in your testimony, I realize that you feel the best deterrent of all against price fixing is vigorous criminal prosecution by the Antitrust Division. However, as between the two sides of this debate I just mentioned, what is your opinion as to whether contribution would enhance or diminish the deterrent effect of damage actions?

Mr. **Bell**. I think I can best answer that, Mr. Chairman, by saying that I do not think it will decrease the deterrent effect of damage actions. It will not decrease it.

In the best of all worlds if we could retrace our steps, I think we would do away with treble damages and get on to single damages. We would continue to pay the plaintiff's attorney's fees and we probably would do away with joint liability based on the commonsense approach that you ought not to have to pay damages except where you cause the damage. However, I know we are not going to go back that far, so this bill is a middle ground.

Now any treble damage is bound to be a deterrent when you have to pay three times the damage you have caused plus the lawyer's fees. Therefore, it seems to me that for some years we have been engaged in overkill in enforcing antitrust laws. To argue that something less than confiscation, something less than taking over an American business and giving it to the lawyers—because the plaintiffs usually get very little out of these cases—is not enough deterrent seems to me to be absurd. I think we have lost our connection with commonsense in this whole area.

Leave treble damages and leave joint liability. Nobody I have heard is suggesting we stop that. Then you have ample deterrent. We do not need—and I repeat—to go to the point of confiscation. That is about where we are today, particularly on small businesses.

If you represent someone who gets caught up in one of these monstrous suits, and they will tell you all day that they are innocent, you have to finally say to them that there is joint liability and that damages could be a billion dollars. We will say this company is worth $50 million, and they are offering to let you buy out for a million dollars. What are you going to tell your client? To pay. They pay it, and then they are bitter. I know this happens.

Every time you see some of these clients they are still grumbling about our system of law that put them in that predicament.

It is unjust. It is not worthy of the American system of justice as we have known it. It ought to be changed. I do not think we ought to be deterred by the argument that somehow deterrence is going to be lessened.

The CHAIRMAN. Judge Bell, along the lines of my first question, it seems to me that at some point we must ask the question how much deterrence is enough and what should our realistic expectations be. Are you of the opinion that the responsibility for treble one's own damages rather than treble the damages for all coconspirators is sufficient, especially in light of the possibility of criminal actions as well?

Mr. BELL. I am. That is in line with what I just said.

Certainly to treble the damages that one brings about, plus paying the lawyers, is an ample deterrent when you still have the risk of going to jail.

The CHAIRMAN. In this regard do you think many antitrust coconspirators ever consider it a realistic possibility that they may be responsible for all their coconspirators' damages if they are detected?

Mr. BELL. I would say that they do. I know of a case firsthand where a small company had to think about that and it had to pay. It had not even been indicted in an industry where almost everyone else had been indicted. They had to pay because they could not run the risk.

I think all the committee has to do is look at the predicament of the Mead Corp. in the corrugated box case in Texas. I am not in the case, but if you just look at that, I suppose there is a chance that the Mead Corp. would have to be delivered over to the plaintiffs. Maybe they would spin off part of it to the plaintiffs, and the lawyers would succeed to the Mead Corp. That is about the shape, it seems to me, that it is in. It all depends on what the judge does about the ad damnum.

CONTRIBUTION SHARE

The CHAIRMAN. Judge Bell, on page 12 of his written testimony, Professor Baxter suggests that allowing a plaintiff's recoverable claim to be reduced by settling defendant's hypothetical contribution share may serve to inhibit settlement. While correctly noting that with each settlement a plaintiff gives up the chance to recover the settling defendant's contribution share of the total damages, Professor Baxter goes on to suggest that if a plaintiff is unable to accurately calculate the contribution share of settling defendants, the plaintiff may shun settlements because of the risk of giving up an unknowable portion of its total claim.

Mr. BELL. I don't agree with that. I have been in many settlements and rarely have I ever seen a plaintiff who did not want to settle if you are going to pay money. The plaintiff's lawyers where there are multiple defendants hope for somebody to settle so that the domino theory will set in and there will be a succession of settlements once one has settled. There could not be any better way for a plaintiff to settle than on a proportion of the sales in an industry, particularly where some people are probably innocent in the group.

The CHAIRMAN. How likely, then, is it that antitrust plaintiffs will in fact be unable to calculate the contribution share of a defendant willing to settle with enough accuracy to be of benefit in determining the proper settlement amount? Do you feel the calculation of such contribution shares under the carve-out formula set forth in the bill would be unduly complicated?

Mr. BELL. I do not think it is unduly complicated. I think it is not complicated at all. It is a very simple way to approach it.

You must bear in mind, Mr. Chairman, that 10 years ago no court would have ever even thought of awarding damages on a percentage of sales. They would make you show your sales. It has been just in recent years that we have gotten into these damage payment concepts which are foreign to anything anyone has ever known where you just say to an industry, "You sold *x* dollars. Give us your percentage of sales. We are going to charge each one of you damages based on a percentage of sales." It has nothing to do with my selling to you. That gets us close to *Illinois Brick*, but I do not want to get into that this morning.

At any rate, this approach seems to me to be quite helpful to the plaintiffs. It simplifies one of these complex cases. It simplifies proof of damages and lets every defendant know where he stands and what the risk may be that each defendant is running. I think it will bring about settlements.

The CHAIRMAN. I have one more question with reference to the Justice Department's testimony. On page 15 of Professor Baxter's testimony he notes a contribution doctrine requires that before a settled defendant's contribution share can be deducted from remaining damages, it must first be established that this defendant would have been liable for those damages had he not settled. Thus, Professor Baxter concludes settling defendants would have their liability litigated in their absence. Do you agree with this analysis?

Mr. BELL. No, I do not. As I understand the way the bill works, the settling defendants, without regard to liability, you just deduct that much from the whole and go on about your business. That person is eliminated.

I do not see anything complicated about that. Maybe I am too dense to understand the complexity of it. It seems to me judges would have no problem with this.

CHANGES IN BILL

The CHAIRMAN. This bill that Senator DeConcini and some others and I introduced is a rather brief bill. It does not appear to be very complicated. Do you have any suggestions you want to make for any changes in this bill?

Mr. BELL. I would not change a thing except, as I said, I would make it apply to cases now pending because I think it would allow us to get rid of some of those cases. We might as well get the dockets cleaned up in this country and let the courts get on to something else.

The CHAIRMAN. Thank you very much.

Senator DeConcini, I will call on you.

Senator **DeConcini**. Judge Bell, thank you for being here. You are just as cooperative as you always were when you were Attorney General to come now and testify. It is greatly appreciated by this Senator.

I have one question I want to ask you now that you are back in the private practice representing commercial clients. When you have a client who has this type of a class action suit against it and facing the joint liability, and perhaps the treble damages, to your experience has that caused a real burden to their ability to continue to finance and expand their businesses? Is that a major factor in settlement?

Mr. **Bell**. Oh, yes. We had a firsthand experience with a small company among giants. That is a problem. It is a contingent liability. The liability is just out of sight when you are talking about the damages for the whole industry.

Senator **DeConcini**. You continuously have to make those disclosures on all financial statements——

Mr. **Bell**. Right.

Senator **DeConcini** [continuing]. And every time that there is an effort to borrow any funds.

Mr. **Bell**. Exactly. When the damages claim is greater than the net worth of the company, it puts the owners in shock.

Senator **DeConcini**. How does it affect the insurance coverage on such cases?

Mr. **Bell**. I do not know that. I cannot think of any insurance problem.

Senator **DeConcini**. Will insurance companies give liability insurance for treble damages and for total liability?

Mr. **Bell**. I do not think so, but let me ask one of my partners who is more expert than I am.

There is no such coverage.

Senator **DeConcini**. There really is no protection for a company——

Mr. **Bell**. You just have to pay.

Senator **DeConcini** [continuing]. If you are in the area of class action suits.

Mr. **Bell**. I have not had any firsthand knowledge about this company in Wisconsin that is in S. 1468. Is it Green Paper Co. or something like that? You have a history of a company.

Senator **DeConcini**. Judge, do you know or do your partners know of something prohibiting insurance companies from covering such cases or do they just not do it because of the horrendous liability?

Mr. **Bell**. This would fall under what we call errors and omissions-type coverage. I do not know that you can get coverage on something that is a law violation. I doubt that you can. It is against public policy.

Mr. Izard, is that the answer? Mr. Izard is one of my partners and an antitrust man. I think he and I agree to that.

Senator **DeConcini**. Thank you, Judge, for being here.

Mr. **Bell**. Thank you.

The **Chairman**. Judge Bell, thank you very much for your appearance. We appreciate your coming. We again recall fond memories when you served as Attorney General and did such a fine job.

Mr. **Bell**. Thank you, Senator.

The **Chairman**. We will take a recess now for 5 minutes.

[Recess taken.]

The **Chairman**. The committee will come to order.

Our next witness is Robert D. Joffe, chairman, committee on trade regulation, Association of the Bar of the City of New York.

Mr. Joffe, we are glad to have you with us. You may proceed with your testimony.

STATEMENT OF ROBERT D. JOFFE, CHAIRMAN, COMMITTEE ON TRADE REGULATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. **Joffe**. Thank you, Senator. I am delighted to be here.

I am a litigation partner at the New York law firm of Cravath, Swaine & Moore.

The **Chairman**. Let me say this before you continue: I notice you have a rather lengthy statement. Our time is limited. Therefore, if it is all right with you, we will put your entire statement in the record following your oral presentation. Then would you just speak off the cuff?

INTRODUCTION—SUPPORT FOR S. 995

Mr. **Joffe**. Certainly. Fine. Thank you.

I am delighted to be here. I am speaking as chairman of the Trade Regulation Committee of the Association of the Bar of the City of New York.

Last year our committee supported S. 1468, which was the predecessor of the current S. 995, with one qualification. We wanted S. 1468 to be limited to horizontal price-fixing cases.

H.R. 1242 adopts that limitation, and we support that. We support S. 995 with the one recommendation that it also be limited to horizontal price-fixing cases. That can be achieved by inserting the word "horizontal" before the word "agreement" where it first appears in the bill.

NEED FOR S. 995

My committee submits that the principles embodied in S. 995 will result in the introduction of a new fairness and rationality into the division of liability among participants in a horizontal price-fixing conspiracy and in a more equitable and reasonable procedure for the settlement of horizontal price-fixing cases where it must be remembered no one has been found liable for any offense.

In areas other than antitrust there has been a clear trend toward the recognition of contribution. While my committee acknowledges that the recognition of such rights in antitrust cases may eventually evolve through court cases, nonetheless, my committee agrees with the sponsors of S. 995 that Congress should create a right of contribution applicable to horizontal price-fixing cases.

The need for congressional action arises from the split of judicial authority on the issue of contribution rights in antitrust cases, coupled with the increasingly large damages now being sought in large horizontal price-fixing cases, and the unfair results—in the form of ever-increasing pressure on nonsettling defendants to settle as they face the risk of an ever-increasing share of total industry damages. The most recent example of that kind of pressure was in the *Corrugated Container* litigation.

I concur fully in Judge Bell's comments as to the fairness of having contribution in horizontal price-fixing cases and the reasons for that. I would like to comment specifically on the claim reduction formula in S. 995. It will avoid the very serious problem which now arises in large price-fixing cases in which some defendants settle with plaintiffs relatively early in the proceedings, while remaining defendants whose belief in their own innocence would justify a decision to litigate the merits of claims against them face liability for all the damages found to have resulted from the challenged conspiracy, despite the plaintiff's own decision to release some defendant or defendants for amounts much lower than the damages caused by the settling party or parties.

Moreover, under S. 995 settlements in price-fixing cases will not work any unfairness to other parties in the litigation. The settling parties will be certain of the impact of the settlement. The defendants who settle will be released from claims for contribution and will have bought a final peace. Joint and several liability remains so that a plaintiff's rights vis-a-vis the defendants are not changed. A plaintiff still need not pursue difficult to reach or absent defendants in order to obtain a full judgment. The burden is on defendants to seek recovery against each other.

RESPONSE TO CRITICISMS OF S. 995

In reaching its decision to recommend passage of a revised version of S. 995, my committee has considered two basic criticisms of the legislation: (a) that it will undermine the deterrent effects of the antitrust laws, and (b) that it will hinder settlement of price-fixing cases.

NO ADVERSE EFFECT ON DETERRENCE

My committee does not believe that such legislation will remove a significant deterrent to pricefixing.

First—and this is in response really to the question raised by Senator Thurmond—my committee knows of no empirical evidence that businessmen, including the most sophisticated, factor the possibility of liability for an entire industry's actions falling on one firm's shoulders into any decisionmaking process with respect to whether or not they should fix prices.

Second—and I think this is really the more important point—treble damages, even for the injury caused by a single actor in a price-fixing conspiracy, are a very substantial deterrent. When coupled with what my committee believes is the more frightening possibility of jail sentences and massive criminal fines on individuals, simple treble damages exposure ought to be sufficient to deter pricefixing in those cases where it can be deterred. Obviously we have failed to deter all pricefixing, but I suggest that making people liable for the entire industry's damages would not deter it in those cases, either.

The problem often is that those who fix prices, middle managers, are not those who have to pay the damages, the corporation. That is what criminal sanctions are for. Greater civil damages are likely to be unavailing.

NO ADVERSE EFFECT ON SETTLEMENT

My committee also is concerned about claims by some lawyers who testified before the Senate Committee on the Judiciary that S. 1468, the predecessor of the current bill, would lead to protracted litigation and remove the possibility of partial settlements of price-fixing cases. My committee feels that, all things considered, the new factors introduced into the settlement process by S. 995 will serve only to encourage more rational settlements and discourage those settlements that are likely to have unfair results for those who continue to litigate after codefendants have settled.

While my committee favors settlement policies that alleviate the judicial burdens of crowded calendars and long-term litigations, it also firmly favors permitting those who wish to use the judicial process to test their innocence to have their day in court. All defendants who want a day in court would have one without risking having to pay a premium for the exercise of this fundamental right.

NONHORIZONTAL CASES

Price-fixing cases with vertical elements, however, do not lend themselves to application of either the bill's contribution provision or to its claim reduction provision. We believe that S. 995 should be amended to cure that defect by limiting its application to horizontal cases. In vertical price-fixing cases the mechanism for the allocation of liability that is built into S. 995 will not work. In cases involving defendants at different levels of the distribution chain, apportioning liability according to S. 995's sales or purchase formula is not possible since several defendants are involved in the same sale.

My committee does not believe that a right of contribution should generally be made applicable by statute to antitrust defendants in other types of antitrust cases. Aside from horizontal price-fixing cases, the present allocation of liability among antitrust defendants does not appear to be clearly inequitable. Moreover, there does not appear to be a formula that is both appropriate and workable for apportioning liability among antitrust defendants in nonhorizontal price-fixing cases.

My committee recognizes, however, that in some antitrust cases which do not involve horizontal pricefixing there remains a possibility that the application of the present no contribution arrangement may result in unusual and extremely grave hardship to a defendant. Accordingly, my committee believes that enactment of S. 995 should not preclude a court from considering in those rare cases a judicially created rule of contribution based on the relative fault of the coconspirators; that is, in cases other than horizontal price-fixing cases.

It may well be that after there has been greater experience with claims for contribution under S. 995 it may become easier to see the way to expanding the right of contribution, either judicially or by legislation, in cases other than those involving horizontal price fixing.

By its terms, S. 995 does not apply to pending cases. It applies to existing causes of action, but only in instances where the primary cause of action has already been commenced. I believe, unlike Judge Bell, that any other rule would likely work an unjustice. If the bill were to apply in instances where settlements had already been agreed to, plaintiffs would be aggrieved because they have settled on the assumption that they could still pursue their claim for the balance of uncompensated damages against the nonsettling defendants. It would be unjust to undo that bargain.

Likewise, those defendants who settled presumably did so only because they believed they were buying peace and would not face claim for contribution. To undo that bargain would also work an injustice.

Finally, those defendants who chose not to settle did so knowing the risk they faced under the law as it was. To leave that situation as it stands seems preferable to upsetting the expectation of settling plaintiffs and settling defendants who acted on the assumption that there was no contribution and no carve out.

CONCLUSION

In sum, my committee believes that S. 995, as amended to apply to horizontal price fixing, would greatly improve fairness and rationality in the application of the antitrust laws. Defendants who want a day in court could have one without risking the payment of a premium for the exercise of this fundamental right.

My committee believes that the bill's enactment would result in a more equitable and reasonable procedure in the settlement of horizontal price-fixing cases and would in no meaningful way reduce the deterrent effect of the antitrust laws. My committee urges the prompt passage of S. 995, as amended to apply to horizontal price-fixing cases.

Senator DOLE. [acting chairman]. In the absence of the chairman, because I think he has a number of questions, I will now authorize counsel to ask those questions.

FEASIBILITY OF CARVE OUT

Mr. CANNON. Mr. Joffe, you are obviously an able and experienced litigator of antitrust cases. I would like to draw on your experience for a moment to explore the merits of the carve out provisions of S. 995. In your testimony you note that you feel these provisions provide a readily applied and realistic formula for dividing liability among price fixers. Looking back on the antitrust cases which you have been involved, has a formula such as that provided in S. 995 ever been utilized? If not, what has been the basis for determining settlement amounts in various cases?

Mr. JOFFE. That really is the formula that is used almost universally in apportioning liability or apportioning responsibility in sharing agreements among defendants. In other words, when defendants have to decide among themselves how they are going to ante up, they use their sales.

When plaintiffs come and talk to defendants and try to get them to settle, the first thing they do is point to their sales and then try to estimate an amount of overcharge.

Therefore, I do not see any difficulty in using sales as a basis for the carve out provision in this bill. It is the basis which is generally used in all litigation that goes to conclusion in price-fixing cases; the sales of each defendant are well known.

Mr. CANNON. Let me follow up on my first question by asking you a question which Senator Thurmond asked Judge Bell.

Objections to the carve out formula have been voiced on the grounds that it would be difficult for a plaintiff to determine the amount of damages specifically attributable to various settling defendants and, thus, a plaintiff would be reluctant to give up an unknowing part of his claim. What is your opinion as to how complex the operation of the carve out provision would be?

Specifically, in your testimony you note, for example, that the share of damages attributable to each defendant may or may not correspond to that defendant's share of sales to the plaintiff because of such factors as product mix and the relative cost to each defendant. Will questions like these be easy to resolve?

Mr. JOFFE. It seems to me in horizontal price-fixing cases, which is what we urge the bill be made applicable to, there should be no problem. Sales of each defendant are well known. They have computerized records. Even if the plaintiffs do not know from whom they bought or what the total volume of sales is, the defendants know and that is readily ascertainable.

The only question which remains is the amount of the overcharge on each defendant's sales. That usually is estimated and could be estimated here.

It does not seem to me any greater difficulties are presented in the settlement context under this bill than would exist without it. I do not think one additional calculation has to be made under the bill than without it.

Let's take a price-fixing conspiracy among electrical equipment manufacturers and one of them settles. The plaintiffs know now what the sales of, let's say, transformers were, and they know that is coming out of the pot.

DESIRABILITY OF EXPLICIT FORMULA IN HORIZONTAL CASES

Mr. CANNON. Mr. Joffe, the suggestion has been made that perhaps it would be best to allow the courts to make their own determination of the best method for applying both contribution and claim reduction to any given case depending on the circumstances. This flexibility, it is argued, would assure maximum fairness. On the other hand, the argument is made that this approach would greatly complicate antitrust suits as a result of the wide variety of contribution methods from jurisdiction to jurisdiction. What is your opinion as to the desirability of this approach?

Mr. JOFFE. In horizontal price-fixing cases it does not make any sense because in horizontal price-fixing cases sales and the amount of overcharge are as good an estimate of fault and fairness as any other. I cannot really readily conceive of horizontal price-fixing cases where sales and amount of overcharge are not the measure that a court would use.

To leave it up to a court in horizontal price-fixing cases would create such a measure of uncertainty that a defendant would be in the same position he was without the bill; that is, he would not know whether to litigate or settle; he would not know whether if he continued to litigate he might face liability for the entire pot.

I see no reason to defer that matter to a court since they ought to come out that way, and the defendants and plaintiffs ought to have the benefit of certainty.

In nonhorizontal price-fixing cases it is almost impossible to figure out in advance what the right formula should be. That is why I would urge that the bill not apply to nonhorizontal price-fixing cases.

Senator **Dole**. I have no questions. I understand that is all the questions the chairman has.

Are there any other comments you wish to make, Mr. Joffe?

Mr. **Joffe**. No. Thank you very much.

Senator **Dole**. Thank you.

[Prepared statement of Robert D. Joffe follows:]

STATEMENT OF ROBERT D. JOFFE TO THE SENATE JUDICIARY COMMITTEE ON S.995

I am Robert D. Joffe, a litigation partner at the New York law firm of Cravath, Swaine & Moore. Although I litigate all varieties of complex cases, including securities and tort actions, my speciality is antitrust litigation. I also serve as an antitrust counselor to those considering the antitrust implications of contemplated business decisions.

In addition, I am Chairman of the Committee on Trade Regulation of the Association of the Bar of the City of New York. Today I am speaking both as an individual practitioner and as Chairman of the Trade Regulation Committee. The references to the views of the Committee in my statement are also my own views. If at any point I should be speaking in a purely personal capacity, I will make that clear.

Last year the Committee on Trade Regulation issued a report with respect to S.1468, the predecessor of the present S.995. While I was not Chairman of the full Committee last year, my term commenced in July 1980 and runs for three years; I was on the Committee and Chairman of the Subcommittee which drafted the Committee's Report on S.1468. The Report issued by the full Committee supported S.1468 with one qualification. The Committee urged that it be made clear that the bill applies only to horizontal price-fixing agreements. I am happy to note that this suggestion has been incorporated in H.1242, and accordingly the Committee supports that bill and urges that S.995 be amended to make it applicable to horizontal price-fixing cases. That amendment may be achieved by inserting the word "horizontal" before the word "agreement" where it first appears.

S.995 embodies four basic principles. First, it establishes a right to contribution for damages attributable to an agreement by two or more persons to fix, maintain or stabilize prices. Second, in any action to enforce the newly created right of contribution, the bill apportions liability among the coconspirators according to the damages attributable to the sales or purchases of each. Third, each settlement which a plaintiff enters into in the underlying price-fixing case reduces the plaintiff's claim against the nonsettling defendants by the greatest of (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for the release or covenant, or (3) treble the actual damages attributable to the settling defendant's relevant sales or purchases. Fourth, S.995 provides that any release or convenant entered into in good faith in the underlying price-fixing lawsuit absolves the settling defendant or defendants from liability to any person for contribution.

The Committee supports the enactment of these principles embodied in S.995. This statement addresses the desirability of S.995 as applied to horizontal price-fixing cases (Part I below), the undesirability of applying S.995 to vertical price-fixing cases (Part II below), the undesirability of legislation creating a right of contribution in other types of antitrust cases (Part III below) and some technical comments on the language of S.995 (Part IV below).

I. S.995 Is Desirable Legislation for Horizontal Price-Fixing Cases

The Committee submits that the principles embodied in S.995 will result in the introduction of a new fairness and rationality into the division of liability among participants in a horizontal price-fixing conspiracy and in a more equitable and reasonable procedure for the settlement of horizontal price-fixing cases, where it must be remembered no one has been found liable of any offense.

The Committee believes that the Senate Committee on the Judiciary's Report last year on S.1468 demonstrates that the interests of fundamental fairness will be served by legislation creating a right of contribution in horizontal price-fixing cases. As is detailed in the Senate Judiciary Committee's Report on S.1468, in areas other than antitrust, there has been a clear trend toward the recognition of contribution rights among joint tort-feasors under both state and Federal law based on considerations of basic fairness among the defendants. The Committee notes that the recognition of such rights for antitrust defendants may well evolve judicially. Nonetheless, the Committee agrees with the Senate Judiciary Committee's conclusion that Congress should create a right of contribution applicable to horizontal price-fixing cases. The need for Congressional action arises from the split of judicial authority on the issue of contribution rights in antitrust cases, coupled with the increasingly large damages now being sought in large horizontal price-fixing cases, and the unfair results--in the form of ever increasing pressure on non-settling defendants to settle as they faced the risk of an ever increasing share of total industry damages--that flowed from the absence of contribution rights in, most recently, the Corrugated Container litigation.

Moreover, as is noted below, the Committee believes that as applied to horizontal price-fixing cases, the bill's provisions and formulae for apportioning the recognized right of contribution and for reducing a plaintiff's claims in cases of settlement with less than all defendants are logical, equitable and consistent with sound judicial public policy.

The fairness of apportioning liability pursuant to the formula set out in S.995 fits the nature of the horizontal price-fixing conspiracy. Relative degrees of fault and responsibility in horizontal price-fixing cases are not matters that courts should have to deal with, since generally all participants in a price-fixing conspiracy among competitors could withdraw from the conspiracy by pricing in a manner inconsistent with the artificial price levels resulting from the conspiracy. Moreover, apportionment of liability in relation to the damage caused by each conspirator (i.e., based on each defendant's share of the sales or purchases at issue) provides a readily applied and realistic formula for dividing liability. Quite simply, each price-fixer has been benefited by the sales that it has made times the overcharge found to have resulted from the price-fixing conspiracy or by the purchases that it has made times the discount from market price found to have resulted from the conspiracy. Damages can be traced to distinct sales or purchase transactions between a plaintiff and a single defendant, as to which other defendants were not parties.

Hence, the Committee agrees with the Senate Committee on the Judiciary that S.995 as applied to horizontal price-fixing cases will rationalize the allocation of damages so that liability can be equitably apportioned by allowing those defendants who must satisfy a judgment to collect the part of that judgment attributable to others who were not named as defendants in the price-fixing case or to interpose claims for contribution through third party practice in the underlying price-fixing litigation.

The Committee also believes that the mandatory claim reduction formula and the related release of settling parties from contribution claims will result in fairness to all involved in a horizontal price-fixing case. As to the claim reduction formula, S.995 will avoid the very serious problem which now arises in large price-fixing cases in which some defendants settle with plaintiffs relatively early in the proceedings, while remaining defendants whose belief in their own innocence would justify a decision to litigate the merits of claims against them face liability for all the damages found to have resulted from the challenged conspiracy, despite the plaintiff's own decision to release some defendant or defendants for amounts much lower than the damages caused by the settling party or parties.

Under S.995, settlements will result in a reduction of the possible liability to be absorbed by those who litigate on the merits by requiring a plaintiff to carve out of his claims the damages attributable to the acts of those with whom he settles. Hence, nonsettling defendants will not face the choice of defending themselves at a trial at the risk of being held liable for a massive judgment that does not take into account the plaintiff's decision to settle with some defendants on terms very favorable to those defendants.

Moreover, under S.995, settlements in price-fixing cases will not work any unfairness to other parties in the litigation. The settling parties will be certain of the impact of the settlement. The defendants who settle will be released from claims for contribution and will have bought a final peace. Joint and several liability remains so that a plaintiff's rights vis-a-vis the defendants are not changed. A plaintiff still need not pursue difficult to reach or absent defendants in order to obtain a full judgment. The burden is on defendants to seek recovery against each other. While a plaintiff may have to be more careful in determining how much to settle for in dealing with one or some of several defendants, his decisions can be guided by certainty, since the claims reduction formula will allow him to assess the actual effects of his bargain on his ultimate possible recovery.

In reaching its decision to recommend passage of a revised version of S.995, the Committee has considered two basic criticisms of the legislation: (a) that it will undermine the deterrent effects of the antitrust laws, and (b) that it will hinder settlement of price-fixing cases.

A. The Committee understands that deterrence was a major concern of opponents of S.1468, who testified during the Senate Committee on the Judiciary's bearings on the bill and is presumably a concern of the opponents of S.995. However, S.995 does not weaken the principle of joint and several liability in any way that prejudices a plaintiff's flexibility in bringing suit against one or several of the total number of defendants. Rather, S.995 simply permits those defendants who are subject to liability for damages on the basis of joint and several liability to enforce contribution rights against their co-conspirators. The Committee does not believe that such legislation will remove a significant deterrent to price-fixing.

First, the Committee knows of no empirical evidence that businessmen, including the most sophisticated, factor the possibility of liability for an entire industry's actions falling on one firm's shoulders into any decision-making process.

Second, treble damages even for the injury caused by a single actor in a price-fixing conspiracy is a very substantial deterrent. When coupled with what the Committee believes is the more frightening possibility of jail sentences and massive criminal fines, simple treble damage exposure ought to be sufficient to deter price-fixing in those cases where it can be deterred. The problem often is that those who fix prices--middle managers--are not those who have to pay the damages--the corporation. That is what criminal sanctions are for. Greater civil damages are unavailing.

In this respect, a system that allows some to escape liability entirely, or on the basis of "cut-rate" settlements, may in fact encourage some to believe that they will get off cheaply, whereas a system such as that set up by S.995 would at least make more certain the threat that one may well be liable in actions to enforce contribution rights for those treble damages traceable to one's wrongful acts.

B. The Committee was also concerned about claims by some lawyers who testified before the Senate Committee on the Judiciary that S.1468 would lead to protracted litigation and remove the possibility of partial settlements of price-fixing cases. The Committee feels that, all things considered, the new factors introduced into the settlement process by S.995 will serve only to encourage more rational settlements and discourage those settlements that are likely to have unfair results for those who continue to litigate after co-defendants have settled.

While the Committee favors settlement policies that alleviate the judicial burdens of crowded calendars and long-term litigations, it also firmly favors permitting those who wish to use the judicial process to test their innocence to have their day in court. The Committee believes S.995 will bring greater justice to antitrust price-fixing cases.

True, the plaintiff will now have to examine more carefully his settlement possibilities, but his tradeoff will be made on an intelligent and certain basis by referring to the simply mechanical formula for claims reduction set out in S.995. A defendant who opts to settle may no longer be able to secure a cheap buyout, since S.995 may discourage unreasonably low settlements that now leave others liable for the plaintiff's cut-rate settlement with a settling defendant or defendants, but a new basic fairness in the apportionment of damages will inform the settlement process. Most importantly, all defendants who want a day in court will have one without risking the payment of a premium for the exercise of this right.

II. S.995 Should Not Apply to Vertical Price-Fixing Cases

Notwithstanding its endorsement of the purposes of S.1468 and its agreement that S.1468 will operate fairly in horizontal price-fixing cases, the Committee perceived a basic defect in S.1468. As is evident from the Senate Committee on the Judiciary's Report on S.1468, the bill was drafted with one type of price-fixing case in mind, the horizontal price-fixing conspiracy. The bill's defect was that its language, perhaps unintentionally, extended an approach which was well-suited to deal with horizontal price-fixing cases to all other price-fixing cases. Price-fixing cases with vertical elements do not lend themselves to application of either the bill's contribution provision or to its claims reduction provision. We believe that S.995 should be amended to cure that defect by limiting its application to horizontal cases.

As is noted above, competitors who fix prices are unlawfully enriched in relation to the sales or purchases made by them in furtherance of the price-fixing conspiracy, and those damaged by the price-fixing are damaged in direct relation to each of the conspiring competitor's tainted sales or purchases. Furthermore, each defendant is responsible for discreet transactions with potential plaintiffs in which the other defendants have no part. For example, if A, B and C conspire to fix the price of an article that they sell in competition with one another to a plaintiff who bought 10 of the articles from each defendant, each defendant has caused the damages resulting from its overcharges on its sales.

However, in many price-fixing cases, the mechanism for the allocation of liability that is built into S.995 will not work. These cases would include vertical price-fixing cases and other price-fixing cases which may involve defendants at different levels of the distribution chain. In such cases, apportioning liability according to S.995's sales or purchases formula is not possible.

As to defendants in vertical price-fixing cases, each defendant will not be responsible for discreet transactions in which no other defendant has a part. Rather, the supplier who maintains the resale price of his goods will be involved in each and every tainted sale made by his customers. Similarly, middlemen who facilitate an essentially horizontal price-fixing conspiracy would not account for any sales or purchases other than those already attributable to some conspirators operating at a higher distribution level.

In addition, in some vertical price-fixing cases (see, e.g., Albrecht v. Herald Co., 390 U.S. 145 (1968)), the plaintiff may not be a customer or supplier damaged in any sense by an artificial price for the sales or purchases which were tainted by the antitrust conspiracy. As to a plaintiff, such as a dealer terminated as a result of an illegal resale price maintenance scheme, the concept of liability based upon the damages attributable to each defendant's sales or purchases would be inapplicable, since such a plaintiff is not injured by any artificially high or low price, but instead by the loss of an opportunity to resell a product because of his unwillingness to agree to charge an illegally dictated resale price.

Thus, this Committee proposes that S.995 should be limited so as to provide for contribution only to the extent that liabilities arise by reason of a horizonal price-fixing conspiracy. This Committee also proposes that the legislative history of S.995 clearly state that the statute is to apply only to competitors in a horizontal price-fixing conspiracy, not to suppliers or customers or intermediaries who might also be co-conspirators. The reasons for this differentiation are set forth in Part III below. Since the statutory text does not lend itself to revisions which would make this distinction clear, the Committee recommends that the distinction be stated in the legislative history of S.995.

III. Contribution Among Antitrust Defendants Should Not at This Time be Authorized Except for Horizontal Price Fixing Cases

The Committee supports the creation of a right of contribution among antitrust defendants who have incurred liabilities by reason of their involvement in horizontal price-fixing. A right of contribution in such cases has been justified by the inequitable allocation of damages that occurs when no contribution is permitted. Moreover, the principles of allocating liabilities among antitrust defendants which are embodied in S.995 can be applied effectively and appropriately in horizontal price-fixing cases.

However, the Committee does not believe that a right of contribution should generally be made applicable by statute to antitrust defendants in other types of antitrust cases. Aside from horizontal price-fixing cases, the present allocation of liability among antitrust defendants does not appear to be clearly inequitable.* Moreover, there does not appear to be a formula that is both appropriate and workable for apportioning liability among antitrust defendants in nonprice-fixing cases.

There are at least four available options for apportioning liability among antitrust defendants. First, there is the present formula which does not permit a right of contribution and leaves each defendant jointly and severally liable for the damages caused by all defendants (the "No-Contribution Option"). As a result, apportionment of damages among defendants depends upon the plaintiff's decision as to which defendants it will sue. Second, there is the formula in S.1468 (the "Sales Option"). This formula apportions liability among defendants based on the actual damages to the plaintiff attributable to each defendant's sales or purchases. Third, liability could be apportioned on a per capita basis among defendants (the "Per Capita Option"). Fourth, the issue could be left for determination by a judge based on a general standard of relative fault.

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* The focus of the reports by the Senate Committee on the Judiciary on S.1468 and the American Bar Association's Section of Antitrust Law is on horizontal price-fixing cases, even though the latter report recommends a broader application of the right of contribution. Moreover, contribution issues do not appear to have arisen with any frequency except in horizontal price-fixing cases. Out of at least 8 reported cases dealing with contribution among antitrust defendants, only 1 (Professional Beauty Supply v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979)) has not involved horizontal price-fixing.

Except where the underlying liability is based on a horizontal price-fixing arrangement, the Committee does not believe that the Sales Option or the Per Capita Option provide a significant improvement over the present No-Contribution Option. Examples based on horizontal price-fixing, vertical price-fixing and horizontal market allocation will illustrate how liabilities would be apportioned based on the methods noted above. The discussion will address first the results by using the No-Contribution Option, the Sales Option and the Per Capita Option. Apportionment of liability by a judge based on relative fault will be discussed separately.

A. Horizontal Price-Fixing. Assume that P sued A, B and C for $10,000,000 in damages (before trebling) under Section 4 of the Clayton Act claiming that P was injured by reason of a conspiracy among A, B, C and D that violated the Federal antitrust laws. P elected not to include D as a defendant. Three weeks after the complaint was filed, P settled with A, fully releasing P's claim against A in return for A paying P $100,000. P's claim against B and C was tried, resulting in a judgment for P. B and C did not bring D into the proceeding by asserting any right of contribution. The court found that A, B, C and D conspired in violation of the antitrust laws and that the damages to P from the conspiracy amounted to $10,000,000 before trebling and before making any adjustments for the settlement with A.

Under present law where B and C have no right of contribution, B and C are each liable to P for $29,900,000 ($10,000,000 trebled less the $100,000 settlement), subject to whatever sharing agreement B and C may have entered into to apportion liability among themselves. A's liability ended with its $100,000 payment. D, although a guilty conspirator, bears no liability. This result would occur in all types of antitrust cases where no contribution was permitted.

Under the apportionment principles of S.995 as applied to a horizontal price-fixing case, the result would be different. Assume for this purpose that P is a dealer in home appliances and that A, B, C and D are manufacturers of appliances who conspired to fix prices for sales of appliances to dealers. The trebled damages* to P attributable to the sales of A, B, C and D are assumed to be as follows:

	Trebled Damages Caused by All Co-Conspirators		Trebled Damages Caused by Non-Settling Co-Conspirators	
	Amount	Percent	Amount	Percent**
A	$10,200,000	34	--	--
B	7,500,000	25	$ 7,500,000	37.9
C	4,800,000	16	4,800,000	24.2
D	7,500,000	25	7,500,000	37.9
	$30,000,000	100%	$19,800,000	100%

Thus under S.995 B and C are liable to P for $19,800,000 ($30,000,000 less $10,200,000, which represents the trebled amount of actual damages ($3,400,000) attributable to A's sales to P). A's liability ended with its $100,000 payment. B and C may each claim contribution against each other and against D. Assuming B and C successfully demonstrate in their contribution action against D that D is also liable as a co-conspirator, then under the Sales Option formula of S.995 liability will ultimately be apportioned among the co-conspirators as follows:

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* Note that the S.995 formulae are not based on total sales of each defendant to the plaintiff. Rather, they are based on a determination of actual damages to the plaintiff attributable to each defendant's sales to P. Depending on such factors as product mix and the relative costs of each defendant, the share of damages attributable to each defendant may or may not correspond to that defendant's share of sales to the plaintiff. These calculations must be made in determining each plaintiff's damages and so no additional work is involved in affecting contribution.

** These percentages have been rounded to the nearest tenth of a percent. Full percentages are required to obtain precisely the apportionment result set forth on the next page.

A	$ 100,000
B	7,500,000
C	4,800,000
D	7,500,000
	$19,900,000

In the Committee's view, this result is more equitable than the apportionment under a no-contribution rule. The S.995 apportionment principle is a relatively simple, workable improvement. P was in a position to know the amount of damages attributable to A and to determine as a business matter whether the settlement payment was acceptable under the circumstances. And a judge could with relative ease determine how much P's claim was to be reduced as a result of the settlement and what D's share of the liability would be.

B. Vertical Price-Fixing. However, the Committee does not believe that the alternatives for apportioning liability among antitrust defendants in a vertical price-fixing case promise any improvement to the result in a no-contribution situation.

Continuing with the basic facts in the above example, assume that P is a retailer of appliances and that A and C are wholesalers of different types of appliances supplied to them by manufacturers B and D, respectively. Two separate vertical price-fixing conspiracies are found to have existed: A and B have conspired to fix the price of A's sales to P, and C and D have conspired to fix C's sales to P. Assume, for simplicity, that $18,000,000 of trebled damages is attributable to A's sales to P and $12,000,000 is attributable to C's sales to P.

The apportionment of liability in this case under the available options indicated below would be as follows:

No-Contribution Option*

A	$ 100,000	(settlement)
B	14,950,000	
C	14,950,000	
D	0	
	$30,000,000	

Sales Option (S.1468)

A	$ 100,000	(settlement)**
B	0	
C	12,000,000	
D	0	
	$12,100,000	

Per Capita Option

A	$ 100,000	(settlement)†
B	7,500,000	
C	7,500,000	
D	7,500,000	
	$22,600,000	

These results from the Sales Option or the Per Capita Option do not, in the Committee's view, represent an improvement over the apportionment that would result from the present No-Contribution Option.

C. Horizontal Market Allocation. Likewise, the Committee does not believe that the Sales Option or the Per Capita Option represents any improvement over the No-Contribution Option where the underlying liability is based on a horizontal market allocation arrangement.

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* It is assumed hereafter that under this option B and C have a sharing agreement whereby each will pay one-half of the judgment.

** The damages attributable to A's sales to P have been assumed to be $18,000,000. P has accepted $100,000 in settlement for those damages. Thus, P may recover $12,000,000 from B and C, but under S.1468 B may shift all of its liability to C since B made no sales directly to P.

† It is assumed that the liability of B and C under a per capita rule would be reduced as a result of A's settlement by the greater of A's payment of $100,000 or A's per capita share of trebled damages of $7,500,000.

Assume in the example begun above that P is a dealer in appliances and that A, B, C and D are manufacturers of appliances. Assume in this case that A, B, C and D conspire to divide the United States market for selling appliances to dealers on a basis (whether by geographic area or customer category) that results in D being the sole supplier to P. (P, of course, did not wish to sue his only source of supply!) P's injuries result from (a) the higher prices he has had to pay to D since D had no competition from A, B and C and (b) the profits which P lost by being unable to sell the appliances of A, B and C to customers who preferred those appliances and were able to obtain them elsewhere.

The various apportionments of liability in this case would be as follows:

No-Contribution Option

A	$ 100,000	(settlement)
B	14,950,000	
C	14,950,000	
D	0	
	$30,000,000	

Sales Option (S.995)

A	$ 100,000	(settlement)*
B	0	
C	0	
D	29,900,000	
	$30,000,000	

Per Capita Option

A	$ 100,000	(settlement)**
B	7,500,000	
C	7,500,000	
D	7,500,000	
	$22,600,000	

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* Under S.995 a court will have to determine the amount of the $10,000,000 in damages actually attributable to sales by each of A, B, C and D. Since A, B and C made no sales to P, no damages are attributable to their sales.

** It is assumed that the liability of B and C under a per capita rule would be reduced as a result of A's settlement by the greater of A's payment of $100,000 or A's per capita share of trebled damages of $7,500,000.

The results from the Sales and the Per Capita Option do not, in the Committee's view, necessarily represent an improvement over the apportionment that would result from the present No-Contribution Option.

D. Judicial Apportionment. Obviously, the simplistic, mechanical apportionment options illustrated above have as a major advantage their ease of application. A judicial apportionment of liability based on relative fault, on the other hand, may offer as an abstract matter a greater hope for a fair apportionment. However, it also offers the greatest potential for subjecting antitrust litigation to additional complexities and delays.

Moreover, a serious practical problem could arise if Congress created a right of contribution in non-horizontal price-fixing cases and left the issue of apportionment to the judge based on relative fault. Judicial standards for determining relative fault would have to evolve over several years and would probably be different for each type of underlying antitrust violation. During those years, plaintiffs would be unable to predict how an early settlement with only some defendants would reduce the plaintiff's claim.* As a result, there would be an incentive for a plaintiff not to settle until all defendants were part of the settlement.

Finally, there is no evidence that inequities have in fact arisen as a result of applying the present No-Contribution Option to antitrust cases that do not involve horizontal price-fixing.

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* It is assumed that any legislation would provide that a defendant who settles will not be subject to any contribution claim by any other defendant.

On balance then, the Committee is of the view that judicial apportionment of liability among antitrust defendants based on a general standard of relative fault will not as a general matter provide any significant improvement over the present No-Contribution Option.

The Committee recognizes, however, that in some antitrust cases which do not involve horizontal price-fixing there remains a possibility that application of the present No-Contribution Option may result in unusual and extremely grave hardship to a defendant. Accordingly, the Committee believes that enactment of S.995 should not preclude a court from considering in those rare cases a judicially created rule of contribution based on the relative fault of the co-conspirators.* The preferred method for avoiding any such preclusion would be to insert in the legislative history of S.995 a statement such as the following:

"Enactment of S.995 to cover only horizontal price-fixing cases is not intended to preclude a court, in appropriate circumstances, from establishing an equitable claim for contribution based on relative fault in other antitrust cases where the failure to do so will result in inequitable, unusual and extremely grave hardship to a defendant."

A personal note: It may well be that after there has been greater experience with claims for contributions under S.995, it may become easier to see the way to expanding the right of contribution, either judicially or by legislation, in cases other than those involving horizontal price-fixing.

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* In such instances, the court would consider how a contribution rule would be reconciled with other principles of antitrust law, such as those dealing with the in pari delicto defense.

Another personal note: By its terms S.995 does not apply retroactively. It applies to existing causes of action, but only in instances where the primary cause of action has already been commenced. Any other rule would likely work an injustice. If the Bill were to apply in instances where settlements had already been agreed to, plaintiffs would be aggrieved because they have settled on the assumption that they could still pursue their claim for the balance of uncompensated damages against the nonsettling defendants. It would be unjust to undo that bargain. Likewise, those defendants who settled presumably did so only because they believed they were buying peace and would not face a claim for contribution. To undo that bargain would also work an injustice. Finally, those defendants who chose not to settle did so knowing the risks they faced. To leave that situation as it stands seems preferable to upsetting the expectation of settling plaintiffs and settling defendants who acted on the assumption that there was no contribution and no carve-out.

IV. Technical Comments on the Language of S.995.

Two possible ambiguities appear in S.995:

1. S.995 authorizes contribution when persons "are subject to" liability. Does this create a statutory claim among co-conspirators even before a lawsuit on the underlying claim is brought? Can there be a claim for "contribution" when no damages have been awarded on the underlying claim? Presumably, no claim for contribution can justify entry of a judgment until a party claiming contribution has in fact been held liable on this underlying claim. Either the language of S.995 should be revised to make this clear or it should be made clear in the legislative history.

2. In apportioning damages among non-settling co-conspirators under S.995, is the percentage each must bear of the liability based on (i) its share of the total damages caused by settling and non-settling defendants combined or (ii) its shares of the total damages of only the non-settling co-conspirators? See the variation in percentages in III.A. above (page 17) which would result from each of these two alternatives. The legislative history of S.995 should make it clear, perhaps by giving one or more examples, that alternative (ii) above is the correct one, i.e., that the damages attributable to a settling defendant are eliminated not only from the plaintiff's recovery from other defendants but also from the calculation of relative fault among the non-settling co-conspirators.

V. Conclusion

In sum, the Committee believes that S.995, as amended to apply to horizontal price-fixing, would greatly improve fairness and rationality in the application of the antitrust laws. Defendants who want a day in court could have one without risking the payment of a premium for the exercise of this fundamental right. The Committee believes that bill's enactment would result in a more equitable and reasonable procedure in the settlement of horizontal price-fixing cases and would in no meaningful way reduce the deterrent effect of the antitrust laws. The Committee urges the prompt passage of S.995, as amended to apply to horizontal price-fixing cases.

Senator DOLE. Now we have a panel consisting of Mr. George Kress, chairman of the board, Green Bay Packaging, Inc., and Mr. Richard Johnson, chairman of the board and chief executive officer, Menasha Corp.

You may proceed in any manner you wish. Please identify the persons accompanying you.

I believe the chairman will be back in about 2 minutes. Then I will have to leave because I have the IRS Commissioner looking for me—with reference to Finance Committee business, not personal. [Laughter.]

STATEMENT OF RICHARD L. JOHNSON, CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER, MENASHA CORP.

Mr. JOHNSON. I am Richard L. Johnson, and as chief executive officer of a small company that had a serious problem caused by the present State of the law of contribution in antitrust cases, I wish to testify in favor of Senate bill 995. Our experience, I think, is pertinent.

Senator DOLE. I have read your statement. I think it is very pertinent. It will be made part of the record. You may either summarize it, read the entire statement, or proceed in whatever way you wish.

Mr. JOHNSON. If I may read it, I think it will hold together a little better.

Senator DOLE. OK.

Mr. JOHNSON. Thank you.

In 1975 a grand jury was convened to investigate possible criminal antitrust violations occurring in the corrugated container industry.

In 1976 certain records of Menasha Corp., a manufacturer of corrugated containers, were subpenaed. We searched our files and provided the grand jury with all information requested. Menasha was one of about 37 companies which were subpenaed.

We did not expect to be indicted because we have always been careful not to violate any law and have been careful to instruct our employees of the meaning of the antitrust laws and the consequences of their violation; we insist that our employees comply. Our philosophy of law compliance and employee training proved correct, and neither our company nor any of its employees were indicted.

A number of other companies and other companies' employees were indicted. Some companies and individuals pleaded nolo contendre and were fined. Others were tried and found not guilty.

While the criminal investigations were being carried on, certain purchasers of corrugated containers and corrugated sheets filed treble damage actions under section 4 of the Clayton Act against Menasha Corp. and the 36 other container and sheet manufacturers. In 1977 these cases, most of which were class actions, were consolidated into a single court for pre-trial proceedings, and in 1978 a nationwide class of purchasers of corrugated containers and sheets was certified.

However, prior to the class' certification a settlement was entered into by the plaintiffs with one of the major companies, which settlement represented approximately $428,000 per percentage point of the defined corrugated container market. Shortly after that, a second company entered into an agreement for settlement at approximately $1 million per point.

Our attorneys informed us that under current law it appeared quite certain there was no right of contribution. In explaining this to us they stated that if a conspiracy were proven in the civil cases, a plaintiff could attempt to collect all the damages from a single or selected group of defendants. The damages collectable could include all those which he or the whole class had or may have incurred and the selection of such defendants could be made on the basis of collectability rather than culpability.

At this point perhaps it is timely to give a profile of Menasha Corp. to better understand the thinking and actions that occurred subsequently.

Menasha Corp. was founded in Menasha, Wis. in 1849 by Elisha Smith to manufacture turned wooden containers, and this company is still engaged in the manufacture of material handling containers, largely corrugated containers now.

The company now has approximately 2,800 employees and 90 shareholders, and almost all of the shareholders are descendents of Elisha Smith and they own in excess of 95 percent of the company. A number of them are active in its management.

The company has been conservatively managed and has reinvested most of its earnings in additional facilities, so that now it has manufacturing plants in 13 States and is engaged in manufacturing corrugated containers, plastic products, paperboard, and manages its timber. It has a net worth of approximately $125 million.

Because of this reinvestment posture, most of the stockholders' major assets is their investment in Menasha Corp. The conservative management has resulted in a sound balance sheet, good working capital ratios, and little debt.

Now returning to the antitrust settlement picture: When counsel informed us that we could, because of no contribution, be hurt badly regardless of culpability or size of our sales to this industry, we became alarmed.

In our calculations it was evident that if Menasha Corp. were to litigate along with the other defendants and if a conspiracy were found and Menasha were determined to be collectable by the plaintiffs, the company could be assessed damages in excess of $1 billion; we would be bankrupt and our shareholders would have nothing from the fruits of their and their ancestors' work. With that warning from our counsel, we consulted with our directors and several of the major shareholders to ask their advice and permission to accomplish a settlement.

Further, we saw some companies which have not been as conservatively managed seeking special treatment due to their poverty, and in two cases this was recognized and allowed by the plaintiffs. Thus, additional potential burden was placed upon the more soundly financed companies.

We also saw the rash of settlements that ensued and the constant threat by the plaintiffs that unless settlement is made now the price would escalate at the next settlement opportunity. We had little or no information concerning the fact or fiction that had been presented at the grand jury concerning us, or any other company which had been subpenaed; that is, we did not know how strong or weak a case the plaintiffs would have against any of the companies. We were completely in the dark.

We understood the tax treatment of the triple damages. We could not afford the huge costs of litigating an action of this nature nor could we bear the risk of not having each party pay their rightful share of an alleged conspiracy, whether actual or imagined.

With no consideration of the merits, Menasha Corporation was given the opportunity by the plaintiffs to settle on a take it or leave it basis. We chose to settle and paid $2,750,000 per point, and having sold 1.68 percent of the market, we paid a total of $4,600,000. Further, we have to date incurred legal expenses of $651,000 and spent untold hours of executive and staff time.

Menasha was found in a civil case not to be a member of the conspiracy. We and all other settling defendants paid a huge insurance premium. There is in excess of $300 million in this pool. We made our payment to save us from possible bankruptcy.

We thought this payment would end our troubles in this litigation. However, complications continue with opt-out cases and now the Fifth Circuit has remanded to the lower court the settlements which it had approved earlier.

We recognize that without a contribution statute as proposed in S. 995 Menasha Corp. could be again placed in a similar legalized blackmail situation and our stockholders' wealth would again be in jeopardy. To avoid this possibility, we have looked to means of providing our shareholders with the structure so that all their eggs would not be in one basket. Thus, they must have an ownership in a larger company which would not have the risk involved. To provide this facility, we are in the process of spinning off a portion of our assets and exchanging such assets for stock in another company, thus reducing our size and giving our shareholders some protection from the possible loss available under current antitrust laws.

The FTC is attempting to block this divestiture, and it may be that the stockholders will consider a complete sellout.

In conclusion, I hope that the history of Menasha's concern and the steps it feels are necessary for the small closely held company to take will provide some insight into problems that occur where contribution is not available.

I feel that the enactment of S. 995, including that portion of the bill which provides that settling defendant's entire sales could be excluded in the plaintiff's claim against other nonsettling defendants, would be one step—I underline "one step"—in providing a business means to properly defend itself on the merits against practices of legalized extortion now available in the courts.

Senator DOLE. Thank you, Mr. Johnson.

We will now hear from Mr. Kress. Please identify the gentlemen on your right for the record.

STATEMENT OF GEORGE KRESS, CHAIRMAN OF THE BOARD, GREEN BAY PACKAGING, INC., ACCOMPANIED BY DONALD F. KRESS, SENIOR VICE PRESIDENT, AND BERNARD H. SCHRAMM, GENERAL COUNSEL

Mr. KRESS. My name is George F. Kress. I am accompanied by Mr. Donald Kress, to my far right, senior vice president of Green Bay Packaging, and Mr. Bernard Schramm, general counsel of the company.

Two years ago I presented this testimony. Mr. Johnson of Menasha has just presented a parallel experience to ours. Therefore, I will summarize today's prepared statement in the interest of brevity. The how's and why's of the salient points are in the prepared testimony.

The 10 main points are:

First, ours is a family owned business started by me 53 years ago and all our family assets are in this business.

Second, the antitrust class action suits threaten the entire loss of all the work my family and I have done in the past 53 years.

Third, the Federal grand jury investigated and did not indict Green Bay Packaging.

Fourth, in spite of this, our company was named in a class action suit.

Fifth, we made a decision to defend the suit until 80 percent of the class had settled and our potential liability had reached from $2 to $5 billion. This would have wiped out our entire equity and given our legitimate creditors from 1.5 to 10 cents on the dollar.

Sixth, we owed $50 million on a net worth of $70 million. There would be no chance of maintaining this credit or securing new credit with this suit hanging over our heads.

Seventh, we had no choice but to settle for $3,750,000 per percentage point of the market, a total of $5,750,000, a rate seven times higher than the first settlement.

Eighth, a criminal antitrust trial resulted in a verdict of not guilty for all defendants who stood trial. In the civil action after hearing all the evidence in a 3-month long trial, when asked by the judge to respond to a special verdict, to the specific question "Was Green Bay Packaging a member of a combination or conspiracy to fix, raise, maintain, or stabilize prices of *corrugated containers,*" the jury's response was, "no."

Ninth, having been proven innocent, we are out $5,750,000.

Tenth, S. 995 trades overkill or deterrence for the right to trial to prove innocence.

Senator DOLE. I understand Senator Thurmond is coming down the hallway, but while he is on his way he may run into somebody from South Carolina. [Laughter.]

Therefore, maybe counsel should ask Senator Thurmond's question.

Mr. CANNON. Mr. Kress, this question may be more properly directed to your counsel, Mr. Schramm. When you testified at our contribution hearings in 1979 you noted that Green Bay opposed the motion of Westvaco for contribution in the *Corrugated Container* case. Why did you adopt that strategy?

Mr. KRESS. Opposed what?

Mr. CANNON. Opposed the motion of Westvaco for contribution.

Mr. **Schramm**. I will answer that, Mr. Cannon.

I believe at that time it was a strategic move on behalf of our trial counsel to oppose contribution. You must understand that in our opinion at that time contribution was not clearly defined as it is defined in S. 995. We feel that S. 995 defines contribution; it takes the sales of the settling party from that being considered. We are not sure our opinion would have been the same if S. 995 had been the law.

The **Chairman**. Does anyone else have anything to say about this? [No response.]

Mr. Johnson, I note in your testimony that you mention your share of the market in the *Corrugated Container* case in very specific terms, 1.68 percent. We have heard testimony this morning on the question of whether damages attributable to specific coconspirators can be easily determined. Can you tell us how you were able to define your market share so precisely?

Mr. **Johnson**. I believe this was done in negotiations with the plaintiffs' and with the defendants' attorneys. I believe the data that came from that was from the Fiberbox Association, a trade association representing this industry.

The **Chairman**. All right. Thank you.

Is there any other statement any of you desire to make? [No response.]

Senator Baucus has a statement. Without objection, his statement will be placed in the record along with the prepared statement of Mr. George Kress.

We are going to leave the record open for 1 week. In fact, we will make it a week from tomorrow night. Therefore, if any Senator wishes to submit a statement or if he has any questions he wants answered for the record, he will have a chance to do so.

I want to thank all you gentlemen for your appearance here and the contribution you made to this hearing.

The committee now stands adjourned.

[Whereupon, at 11:57 a.m., the committee adjourned, to reconvene at the call of the Chair.]

[Aforementioned statement follows:]

STATEMENT OF GEORGE F. KRESS, CHAIRMAN OF THE BOARD, GREEN BAY PACKAGING INC.

My name is George F. Kress of Green Bay, Wisconsin. I am accompanied by Mr. Donald F. Kress, Senior Vice President of Green Bay Packaging Inc., and Mr. Bernard H. Schramm, General Counsel of the company.

Almost two years ago, I appeared before a sub-committee of this Committee to testify in favor of S. 1468, a bill similar to S. 995 now being considered. The story of our company's recent antitrust experience may be helpful to this Committee in its consideration of the contribution issue, and I very much appreciate the opportunity to appear here today.

Fifty-five years ago, at the age of 23, I started a company which is today known as Green Bay Packaging Inc. Our company manufactures corrugated shipping containers and from its beginning has been a family-owned and managed business.

This business represents my family's entire assets. In other words, "all our eggs are in this one basket". An antitrust class action threatened the entire loss of all the work my family and I have done in the past 55 years. Our recent experience involving the antitrust situation as it currently exists may help you to better understand the problems created for a small businessman in a capital-intensive industry.

Green Bay Packaging Inc. has annual sales of 188 million dollars in an industry with total sales of over 10 billion dollars annually. There are more than 1,000 companies in this industry, with the largest having approximately 8.5% of the total industry corrugated container sales and Green Bay having approximately 1.7% of these sales.

While other much larger corporations in this industry have diversified into related activities accounting for their much greater net worth, Green Bay has grown almost entirely in the corrugated container area and currently has a total net worth of approximately 95 million dollars.

Green Bay employs 1800 persons in the states of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois, Mississippi and Oklahoma.

Four years ago, Green Bay and 38 others in the corrugated container industry received a request from a Federal Grand Jury investigating antitrust price fixing conspiracy allegations. Our company responded cooperatively by furnishing all requested information and witnesses to those conducting the investigation, for Green Bay has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system.

At the conclusion of the Justice Department investigation, 13 corporations and many individual employees who were investigated were indicted for felony or misdemeanor violations of the antitrust laws. Green Bay was NOT INDICTED and none of our employees were named as co-conspirators in this criminal action. This was fully within our expectations for we knew Green Bay had not been a participant in any conspiracy or combination to fix prices.

Less than one year following the Justice Department investigation, our company was named as a co-defendant in more than 25 class action lawsuits brought against all of the 39 corporations - whether they were indicted or unindicted. They were all included.

Our management didn't feel overly concerned by these actions for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action lawsuits, we concluded that our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in these civil actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs. This settling trend ignited a five-week "settlement stampede" resulting in many of the defendants entering into settlement agreements with the plaintiffs in the class actions.

At this time, mystified by the action on the part of the unindicted companies, Green Bay conducted a detailed analysis of the situation and found as follows:

1. Approximately 80% of the defendants had entered into settlement agreements with the class plaintiffs;
2. The amount contributed by the settling plaintiffs at that time totaled over 250 million dollars.
3. Settlements were being arrived at by a formula decided upon solely by the plaintiff's lawyers, having as its base, the percentage share of the market, times a required dollar figure. With each successive settlement, plaintiffs demanded and received amounts at a higher rate than prior settlements, without regards to the merits of their claims. Green Bay found that the dollar figures which had been offered to the first settling defendant, $500,000 per percentage point,

had been steadily raised by the attorneys for each succeeding settling defendant, until the amount which was requested from our company for settlement was $3,700,000 per percentage point, or 7.5 times the amount offered the first defendant to settle. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment. It would go up later and it was offered "take it or leave it." Plaintiffs further refused to remove the sales of each settling defendant from the litigation, thereby resulting in subsequent nonsettling plaintiffs being threatened with exposure to damage claims based upon the sales of the entire class.

4. Settlements in class actions such as this are encouraged by the Courts.

Green Bay thereby realized that it faced a monumental decision -- pay the $5.5 million settlement, or face the financial risk that it may ultimately be the only remaining defendant who, under the existing law, would be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy. The absence of a right of contribution and claim reduction therefore served to coerce us into a settling posture.

An estimate of the potential damages which might be decided by a Court was then necessary in order that a proper assessment of the situation be made.

Using a variety of assumptions, in order to arrive at a feasible damage figure which might ultimately be determined by a jury, we assumed that a damage figure of 5% of the total industry annual sales was feasible. Subtracting the settlements already made, and multiplying the results by 2½ times after taxes, we concluded that we must stand ready to bear the burden of a potential legal liability of from 2 to 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability.

The choices available to Green Bay management became clear and the extortion aspect of civil class actions suits was indeed now understood.

Our company was faced with the following choices:

1. Settle the pending class action suits by paying more than 5.5 million dollars to the plaintiffs' lawyers and still face the liability of defending the individual antitrust civil suits which might be brought by plaintiff

customers who do not wish to participate as members of the class; or

2. Stand ready to continue to defend the class action suits and face the burden of a contingent liability of over 2 billion dollars. This contingent liability would have to be reported to Green Bay's mortgage holders, and potential lenders, who would be very reluctant to ever consider lending additional moneys to a corporation facing this severe liability. Our company's borrowing power was thereby voided.

With this threat of insolvency hanging over our corporate heads, the owner-managers and outside directors of Green Bay reluctantly concluded a settlement agreement with the plaintiffs' attorneys in the class actions. Loss of borrowing power is the killing factor for a small, privately-owned corporation involved in a capital intensive industry. A small business such as ours must borrow in order to compete. With a net worth of $70 million dollars, our then current borrowing was in excess of $50 million dollars.

The above cited situation has been repeated many times in the settlement process of the civil class action antitrust suits now pending in the corrugated container industry.

An update of the status of this case since our settlement in January of 1979 might prove enlightening.

1. The criminal antitrust trial resulted in a verdict of not guilty for all defendants who stood trial.
2. In the civil action, the jury, after hearing all the evidence in a three month long trial was asked by the judge to respond to a special verdict specific question: "Was Green Bay Packaging Inc. a member of a combination or conspiracy to fix, raise, maintain or stablize prices of corrugated containers throughout the United States?" The jury's response was: NO.

The effect of the extortive settlement practice upon a small family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exhorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

I believe the right of contribution and claim reduction in antitrust cases would insure fairness in the apportionment of damages among antitrust defendants and would still promote the deterrent policies that are the underlying purpose of the antitrust laws.

THE ANTITRUST EQUAL ENFORCEMENT ACT

MONDAY, MAY 11, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to recess, at 10:07 a.m., in room 2228, Dirksen Senate Office Building, Senator Howard Metzenbaum (acting chairman of the committee) presiding.

Also present: Senator Grassley.

Staff present: Peter Chumbris, antitrust counsel, and Steve Cannon, antitrust counsel.

OPENING STATEMENT OF SENATOR HOWARD METZENBAUM

Senator **Metzenbaum** (acting chairman). The hearing will come to order at this time.

It will be a relatively brief hearing. We are very happy to hear those who are here to testify. However, in the absence of committee members, it is quite obvious that nobody is going to be persuaded by the eloquence of your remarks, but we think that it is important that the record in this matter be clear that there are two sides to the issue. It is for that reason that the Chair felt it was important to go forward with the hearing this morning.

Few antitrust issues are as complex as the ones raised by the bill we are addressing today. At the outset let me say that I do not oppose contribution in all antitrust cases. The courts should have authority to permit contribution when it is in the public interest and fair to all parties. Courts must have flexibility to determine on a case-by-case basis when contribution should be available and to tailor contribution rules to the facts of particular cases.

I am convinced, however, that the rigid approach of S. 995 is a bad idea at this time. I think it may well undermine the ability of the antitrust laws to deter price fixing and will further complicate and lengthen antitrust litigation.

I also believe it is particularly inappropriate for this committee to rush headlong to report S. 995 when the Supreme Court is at the same time dealing with these complex issues in the *Texas Industries* case.

Price fixers do not deserve mercy. Price fixing is almost always an intentional criminal act which costs small businesses, government at all levels, and consumers untold millions of dollars each year. No one can mistake price fixing for legitimate business activity. It is simply impossible to "over" deter price fixing.

Indeed, Assistant Attorney General Baxter stated in his testimony on April 22 that "the social desirability of deterrence cannot be doubted" in "cases involving clear, horizontal, cartel-type violations". Yet, S. 995 applies only to the type of antitrust violation Assistant Attorney General Baxter described—price fixing. S. 995 will reduce the existing price-fixing deterrence under the antitrust laws.

A potential price fixer will be looking at a possible liability, for example, of $30 million under S. 995 instead of $90 million under current law. This means, of course, the potential price fixer will be considerably more likely to price fix if S. 995 becomes law.

John Shenefield, then-Assistant Attorney General in charge of the Antitrust Division, pointed this out in testimony before the Subcommittee on Antitrust, Monopoly and Business Rights in the last Congress. He said then that, "[W]e can all imagine situations in which a very large company * * * might think quite cold-bloodedly about the advantages of going into a price-fixing conspiracy as against its potential liability and decide differently under this regime"—that is, with contribution—"than under the previous regime."

Assistant Attorney General Baxter echoed Mr. Shenefield's concerns in his testimony on this bill. He said, "I would be least willing to accept"—and he obviously is referring to the costs of contribution—"where the behavior in question is clearly harmful and clearly illegal; where the violation is covert and therefore not readily detectable by its victims; and where the violation was undertaken with disregard for the law."

He said, "I am thinking here of the basic cartel violations—horizontal price fixing, market division or customer allocation. In such cases the risk to deterrence is at its maximum while the need to eliminate unfairness is at a minimum."

In addition to reducing deterrence, S. 995 will add new complications to antitrust cases and extend cases which are already lasting far too long.

Although former Attorney General Bell testified in favor of S. 995, his partner in the law firm of King & Spalding, John Izard, has a different view. Mr. Izard, a former chairman of the ABA's antitrust section, has said:

> To allow contribution among conspirators would add new complications to the inextricable maze of class antitrust litigation. To permit defendants to seek contribution from one another would, however, greatly complicate class antitrust litigation, which is already labyrinthine. Plaintiffs might even lose control of their cases with defendants vouching in other members of the industry and filing cross claims against one another.

I would not be surprised if many price-fixing victims—usually small businesses, State and local governments, and consumers—will conclude that the litigation obstacles created by S. 995 are too costly to overcome and decide not to exercise their rights to file suits to cover the illegal overcharges. As a result, the ability of the antitrust laws to deter price fixing will be reduced even more.

Although the supporters of S. 995 claim that the bill will help small business, the facts simply do not bear this out. Small businesses are usually the victims of price fixing.

Any bill like S. 995 which reduces price-fixing deterrence and makes it more difficult for small businesses to recover price-fixing overcharges plainly hurts, not helps, small business.

In addition, there is no persuasive evidence that smaller defendants are somehow unfairly treated during the settlement of price-fixing cases. The fact is that S. 995 will make it more difficult for plaintiffs to settle early and cheaply with the smaller defendants, as they often do now. Smaller defendants may well be driven to the brink of bankruptcy if S. 995 is enacted.

I share Mr. Baxter's doubts that S. 995 is the best method to protect small businesses, if it protects them at all. He testified that:

> We must candidly assess the frequency of harm to small business and the possibility that other remedies, perhaps the use of sharing agreements, may be equally effective before accepting such alleged harm as a justification for the cost of allowing contribution in all cases.

In short, S. 995 will hurt small businesses when they are the victims of price fixing and when they are defendants in price-fixing cases.

Our witnesses today are very experienced in price-fixing cases and will provide us with additional insights into the effects of S. 995 on antitrust enforcement.

Having read that very lengthy statement, I am apologetic because I was talking about each of the witnesses being quite brief and it seems to me I might have set a better example myself.

Mr. Charles Monk II is chief of the antitrust division, attorney general's office, State of Maryland. He is from Baltimore.

Mr. Kenneth Reed is former chief counsel of the antitrust division, Arizona Attorney General's Office of Phoenix, Ariz.

It is nice to have both of you with us this morning.

It is my understanding that the staff has indicated that it would be preferable if you could confine your oral remarks to something in the area of 5 minutes. We will put your entire statements in the record following your oral presentations.

STATEMENT OF CHARLES MONK II, CHIEF, ANTITRUST DIVISION, ATTORNEY GENERAL'S OFFICE, STATE OF MARYLAND, BALTIMORE, MD.

Mr. MONK. Very well. Thank you, Senator.

I am pleased to be here today to express the views of a State antitrust lawyer on S. 995. Although this measure is frequently called the "contribution bill," I think a more appropriate name for it would be the "Price-Fixer's Relief Act of 1981." In my view S. 995 will hinder both private and public antitrust enforcement. It will unnecessarily complicate antitrust damage litigation, inhibit and confuse the settlement process, and substantially diminish the deterrent effects of the treble damage claim. It is legislation that will benefit only those who have chosen to break the law. It is, indeed, a "price fixer's relief act."

It has been suggested in prior testimony that it is only fair to permit contribution among price fixers. From the prospective of an antitrust prosecutor, it would seem just as fair to permit contribution among embezzlers or other white collar criminals. Let's not forget that when we are talking about price fixing we are talking about the most serious of antitrust violations, one that subverts the basic premises of our free enterprise economic system and causes millions of dollars of overcharges to be imposed upon American industry.

Simply said, when a group of competitors gets together at a secret meeting and conspires to fix prices or rig bids, it weakens our economy and hurts every taxpayer. Their conduct is inherently unfair to all honest businessmen with whom they deal. It is not fair to the price fixer's customers to be denied the benefits of free and open competition and be forced to pay excessive prices. Consequently, as an antitrust prosecutor I see no real reason to impose new complications on antitrust damage litigation in order to be fair to these lawbreakers.

Let me address three principal problems I have with S. 995.

LESSENING OF DETERRENT EFFECT

First, I think S. 995 serves to diminish the potential financial liability resulting from the price fixer's illegal activity. As the law presently stands, Senator, we know that price-fixers are responsible under a theory of joint and several liabilities. If we assume that businessmen are risk-adverse—and I suggest to you that businessmen would not engage in price fixing if they, indeed, were not risk-adverse because the whole purpose of price fixing is to avoid competition and avoid the unknown of a lower price from your competitor—if we assume that businessmen are risk-adverse, then by imposing the greatest potential liability upon them we raise the greatest possible deterrent.

I have heard an argument that contribution increases the potential that each conspirator will be required to pay for his illegal conduct, and thus increases the deterrent effect of the treble damage suit. This argument is not completely illogical. It overlooks, however, the practical realities of treble damage litigation. Few treble damage price-fixing cases are tried. Most settle because of the risk of joint and several liability imposed upon the defendants. That risk works like an in terrorem clause—fear of the unknown forces the defendants to come to a reasonable settlement.

In many cases in order to settle each defendant must make peace separately with the plaintiff. In doing so, he pays his share, or at least some share, of the illegal damage that he has caused. Typically, these settlements produce a result that is substantially just for all concerned because culpability, ability-to-pay, weight of evidence and similar relevant factors are taken into consideration. Indeed, I think as a practical matter my experience has shown me that there are few, if any, cases where price-fixers "go free."

UNNECESSARY COMPLICATION OF SETTLEMENT PROCESS

Another problem that concerns me is the complication that would be imposed upon settlements by S. 995. Private antitrust litigation—and when I speak in terms of private antitrust litigation, I am referring to suits brought, in addition to a private party, by a State acting in its propriety capacity to recover overcharges it may have paid—private antitrust litigation is designed to augment the antitrust litigation and enforcement efforts of the Department of Justice.

In order to do that, Congress has offered the plaintiff two benefits—treble damages and recovery of attorney's fees and costs. The purpose of these special benefits is to induce the private plaintiff to bring suits that the Department of Justice would not otherwise have brought, and, therefore, encourage overall antitrust enforcement.

Obviously there are lots of treble damage cases which we in the business call "coattail actions." They simply follow what the Justice Department or the Federal Trade Commission has done, or indeed what Ken Reed's office or my office has done at the State level.

Frequently the States bring private treble damage actions that are not coattail actions. They are new antitrust enforcement actions. As I said before, the whole purpose of awarding the treble damages and giving the plaintiff his attorney's fees and costs is to encourage that kind of suit.

I think S. 995 will raise a real barrier to that kind of new private antitrust litigation. In private cases you need to be able to trade settlement for cooperation with the defendant. You essentially pay—by agreeing to settle with one of several coconspirators—for testimony against the other coconspirators.

This does not limit the plaintiff's ability to recover damages because of joint and several liability. You recover all of your damages from the remaining coconspirators.

Frequently a defendant no longer is financially able to pay a large damage award, and he feels compelled by financial circumstances to offer a lesser amount in settlement coupled with an agreement to cooperate with the plaintiff.

We presently have a case in our office involving bid-rigging in demolition contractors. There are 17 defendants and we have settled with about 11 of them, many for much less than the amount of the damages they caused the State simply because some of them are no longer in business. In each case, we have obtained as much financial repayment to the State as possible. In addition, we have obtained testimony against the remaining defendants.

The obvious result is that we have put pressure on the remaining defendants; we have made a better case for the plaintiff; and the Nation as a whole benefits because there is more antitrust enforcement than there otherwise would have been.

S. 995 is going to interrupt that process. The plaintiff will be asked essentially to buy a "pig in a poke." In the early stage of litigation when the plaintiff is negotiating with one of a group of coconspirators to settle, he does not yet know exactly how much damages are attributable to that defendant.

Therefore, if the defendant's lawyer comes in and says, "My client is interested in settling with you," the plaintiff's is going to have to begin making the computation of how much damages are possibly attributable to that defendant to get a handle on how much he is giving up when he agrees to settle. That obviously is a guesstimate at best. The plaintiff will never really know until the case is tried exactly how much is given up. That is going to increase the cost of making those kinds of settlements for testimony, and therefore hamper my State's ability to bring new Federal price fixing actions.

Senator **Metzenbaum**. Would you by that time have known, for example, that the defendant had made 5 percent of the total sales?

Would you have learned that either by interrogatories or depositions?

Mr. **Monk**. Not necessarily. There are so many factors—such as differences in pricing, discounting and lenght of participation in the conspiracy—which may be relevant that making the percent of total sales determination will be extremely complicated.

I hesitate to talk about pending litigation, but in a matter we presently have in the courts we essentially investigated the whole case long before we ever filed the lawsuit. I might add this is, indeed, one of those cases where the Justice Department still has a grand jury going and has not yet returned an indictment. We already have filed a complaint and are well into our lawsuit. I think we are doing a good job of enforcing the Federal antitrust laws. It is a parens patriae action.

In talking with many of the potential defendants in that case, we made it quite clear that they were jointly and severally liable with their coconspirators. We used the potential liability confronting them as a lever to force them to think seriously about coming forward and giving testimony and agreeing to settle. It worked. That is how we made our case.

True, we would have known about the violation anyhow, but whether or not we would have been able to prove it or not would have been another question, unless we had that ability to use that lever against those conspirators.

NEW COMPLICATIONS FOR ANTITRUST DAMAGE LITIGATION

I would like to talk about the settlement penalty imposed by S. 995. It will be a horribly confusing thing to an antitrust plaintiff to try to anticipate what amount of treble damages will be attributable to a settling defendant at the conclusion of trial. The plaintiff has several problems.

First, he is going to have to calculate his damages and anticipate his damages without really knowing all of the potential liability that may be charged to the settling defendant.

The remaining defendants will be arguing that the settling defendant had a greater role in the conspiracy and the plaintiff will be arguing that he had a lesser role in the conspiracy. It will not be as simple as deciding how many sales you made or how many purchases you made from the particular defendant with whom you are settling. Frequently price fixing occurs where a price is pegged at 20 percent above market and then negotiations take place from that point. You would have to try to calculate exactly how much above the competitive price each transaction was made over a series of years. That could take literally months of damage calculation. All those calculations you do not have to make now. Under present law, the plaintiff simply has to make a reasonable determination of how much the total damages are as a result of the activities of all defendants.

I think the result will be that S. 995 is going to truly hamper the settlement process. Plaintiffs will be reluctant to go forward with settlements unless they are certain about the amount of damages attributable to a particular defendant. Defendants are going to be reluctant to settle because they are going to be faced with a situation where, after they have settled, the remaining defendants are going to want to maximize the amount of liability that can be charged to them. The only way to make this determination is to get the settling defendants' records, get witnesses, and bring all of his people in to testify at the trial.

For a settling defendant, rather than to put the case behind him and get it over with, that is going to just embroil him right back in the controversy. That obviously is going to make it difficult for a plaintiff to induce a defendant to settle no matter what the terms. Therefore, we are going to hurt private or, in our case, Government treble damage actions.

I would like to conclude, Senator, by saying that this legislation, it seems to me, is designed only, as I said earlier, to benefit the price fixer. Private treble damage litigation is complicated enough as it is; we do not need this additional burden on the courts or on plaintiffs.

Thank you.

Senator METZENBAUM. Thank you very much. I will have questions for you, but we will hear from Mr. Reed first.

STATEMENT OF KENNETH R. REED, FORMER CHIEF COUNSEL, ANTITRUST DIVISION, ARIZONA ATTORNEY GENERAL'S OFFICE, PHOENIX, ARIZ.

Mr. REED. Good morning, Senator.

I would like to make three points, and three points only, in addition to my written remarks.

The first addresses the notion that S. 995, which appears to be based on an idea of fairness to the defendants, in fact disserves that objective.

The second point I would like to raise is certain technical drafting problems with the bill.

The third and final point deals with my suggestions to the committee on what form and what provisions a contribution should have in the event that a contribution is to be reported.

Going back to my first point, S. 995, as I read the statements of its proponents, the testimony of the witnesses on April 22, seems to be predicated on the notion of being fair to defendants. I suggest to this committee that S. 995 actually disserves that objective and, in fact, is unfair not simply to plaintiffs who are testifying today against this bill, but also to the small defendants that the proponents of this bill seek to help.

Why is it that I take that position? S. 995 would establish a rule that, whether by way of settlement or by way of trial and adjudication, an individual defendant, an individual conspirator's liability can only be determined on the basis of its proportion of the sales of the total market. I daresay that is, No. 1, too rigid a rule and, No. 2, does not always reflect reality.

There are oftentimes in antitrust cases—indeed, I would daresay there is no antitrust case I am familiar with where it is not the case—that the different defendants differ in their degree of culpability. Some defendants in a conspiracy are the ring leaders. Other defendants are defendants who are at the periphery of the conspiracy. Some defendants are relatively well heeled and have what is known as a deep pocket. Other defendants may have only marginal net worth.

I would suggest that if we are to be fair to defendants we should have a rule, we should have a practice, which allows consideration and accommodation of the differences between defendants, that allows a defendant with relatively marginal financial resources to settle out early on a basis relative to its financial resources and not be forced to remain in the litigation and incur legal expenses by the way of defense and risk of judgment that go far beyond its available financial resources.

We should have a rule that will allow the sweetheart deal that General Bell criticized, a sweetheart deal that allows a peripheral defendant, someone whose liability or connection to the conspiracy is more marginal, to settle on more favorable terms than the core defendants, the ring leaders of the conspiracy.

Looking at it from the other side of the coin, in conspiracy cases of this sort, defendants already enter into the practice of entering into sharing agreements. Those sharing agreements, absent S. 995, can take into account differences in the financial wherewithal of defendants. They can and do take into account differences in the culpability. They can and do take into account the leverage the marginal defendant has in being willing to reach an early settlement with defendant versus the price the codefendant is willing to pay the marginal defendant to join into a sharing agreement.

Under the present system flexibility is allowed both from the plaintiffs' side in entering into individual settlements and from the defendants' side in their sharing agreements. By enacting the rigid rule that S. 995 proposes, that possibility for flexibility is gone, and the ability of individual defendants to strike special deals based on their individual circumstances is eliminated.

I dare say, if the defendants are no longer able to say, "I cannot afford to pay any more than this," if defendants are no longer able to say, "I am a marginal defendant and therefore I am entitled to more favored treatment than the target defendant," if defendants are no longer able to say, 'I, as one conspirator, made less from this conspiracy than some other defendant did," as would be the case under S. 995, then flexibility is eliminated and fundamental fairness is disserved.

On the second point, the technical problems inherent in S. 995, in my written testimony I allude to some problems and Mr. Robert D. Joffe in his testimony on April 22 alluded to others; I will not repeat them.

However, there are some additional problems that bear emphasis. No. 1, S. 995 is justified and seems directed to only class actions. The whole logic behind it is in terms of the monumental liability. That is something that applies, theoretically at least, only in class actions. Certainly it does not apply even theoretically in single plaintiff actions. To apply S. 995 to single plaintiff actions, actions by one plaintiff against one defendant, results in some truly anomalous situations.

There are price-fixing cases in Arizona where one plaintiff purchased 100 percent of its supply from one member of a conspiracy. In such cases that plaintiff has been able to name one defendant and seek to obtain its entire damage recovery from that single defendant.

If S. 995 is enacted, that defendant would be able to implead every other seller in the industry and seek contribution from those other sellers based upon their proportion of sales to the entire industry. Whether it makes sense to so expand the litigation seems to me a rather problematic issue.

Senator **Metzenbaum**. What was the degree of culpability of the one defendant in this matter you are just speaking about?

Mr. **Reed**. This particular defendant that I have in mind was one of the basic hard-core coconspirators. I would place that defendant in the category of hard-core conspirators as against the defendants who are either peripherally involved in the conspiracy or against the defendants who had marginal financial wherewithal.

I think the reasons that are articulated in favor of S. 995 apply only to class action litigation at most, but the language and effect of S. 995 would apply to single plaintiff cases. I think in the instance of single plaintiff cases S. 995 has had truly anomalous results.

To my mind, the other very severe defect with S. 995 is the fact that it is spoken of in terms of liability for "fixing, maintaining, or stabilizing prices." Mr. Joffe has already addressed the committee on the problem that that would apply to vertical price-fixing agreements. Senator DeConcini in S. 1068 has posed language which would limit contribution to horizontal cases and not vertical cases, which is a step in the right direction.

However, the difficulty is that even the language "fix, maintain, and stabilize" is at once too broad and, if narrowed, is improperly focused.

A bid-rigging conspiracy under which a number of competitors gets together and one of their members is selected to win the bid and the remaining members of the conspiracy are selected to submit higher bids is normally viewed as an agreement to fix, stabilize, or maintain prices—the prices paid by the governmental entity typically that requests bids.

In that situation, however, by the very nature of the conspiracy there is only one person with any sales, the conspirator which was agreed upon by the conspiracy to submit the winning bid. Yet, all the other conspirators in the smoked-filled rooms where the bids were rigged are and should be liable for that conspiracy. That is an agreement to fix, maintain, and stabilize prices. Yet, S. 995 is totally illogical. It does not logically apply to that situation.

So, too, with other types of what are known as per se violations—horizontal market allocations, horizontal customer allocations. Those are antitrust violations that are normally viewed as violations to fix, maintain, or stabilize prices.

Senator **Metzenbaum**. Mr. Reed, do you think that there is any way that a contribution bill could be drafted that would be fair?

Mr. **Reed**. I do, and that gets to my last point. If the committee is to report a contribution bill, I would suggest that it endorse the approach taken in the *Professional Beauty* case.

Senator **Metzenbaum**. In which case?

Mr. **Reed**. In the *Professional Beauty* case, the one circuit court of appeals opinion that has in fact authorized contribution or has at least said that contribution is not wholly prohibited.

That would be for a bill coming out of this committee to authorize courts to award contribution among those jointly liable, but to establish rules of liability, rules of apportionment, in accordance with our common law approach; namely, on a case-to-case basis, making distinctions as cases arise.

The other significant aspect—and I think this is a mandatory aspect for any contribution bill and it is an amendment which is needed in and of itself—is the matter of amending 28 U.S.C. 1407.

Senator **Metzenbaum**. Are you talking about the language or language similar to that which was proposed by Senator Kennedy and me in the last session?

Mr. **Reed**. Yes, language comparable to what was in S. 300; namely, under section 1407 the Judicial Panel on Multidistrict Litigation is now authorized to transfer cases to a consolidated district only for the purposes of pretrial proceedings, with the exception of parens patriae cases under section 4(c).

I would suggest that the Judicial Panel on Multidistrict Litigation's authority extend not only to transfer for pretrial proceedings, but also that the panel be vested with the authority to authorize transfer for trial.

Any contribution bill is going to envisage a situation where a defendant will be asserting cross claims or third party complaints against additional parties, parties not present in litigation. It may be that those defendants may obtain personal jurisdiction over the third party defendants only in some district other than the one in which the action was originally brought.

If we are to avoid duplicative discovery, burdensome repetition of proceedings, and the possibility of not only inconsistent judgments but the possibility of litigating the same issues in district courts across the country, the Judicial Panel must in appropriate circumstances be authorized to transfer cases brought under the Clayton Act not simply for pretrail proceedings, but also for trial where appropriate. That is a provision which in another context has been endorsed unanimously by the National Association of Attorneys General in the committee on which I sat and by an American Bar Association task force, also in a committee on which I sat.

Senator **Metzenbaum**. Thank you, Mr. Reed.

Mr. **Reed**. Thank you, Senator.

Senator **Metzenbaum**. Mr. Monk, as a State antitrust enforcement official, do you agree with Mr. Bell that treble damages based on sales and criminal penalties provide enough deterrence for price-fixers?

Mr. **Monk**. No, Senator, I don't. As I said in my testimony, it seems to me that the whole concept here is that businessmen are risk-adverse. As long as that is true, we want to increase the potential risk as much as possible.

If a businessman knows when he gets involved in a price-fixing conspiracy that he can limit the amount of his liability to the amount of his overcharges, and he knows that in advance, then he can evaluate the present benefit to him of getting involved in it versus the potential for payment of damages at some future date.

It becomes another business judgment. That kind of thing is very dangerous from an antitrust enforcement perspective.

Senator METZENBAUM. Settlements in *parens patriae* cases are approved by the courts. Will the courts examine these settlements differently than they do now if S. 995 becomes law?

Mr. MONK. I think we can only speculate about that, Senator. It seems to me that the court in a *parens patriae* case, faced with the requirement that it approve the settlement for fairness and reasonableness, is going to have a difficult time squaring that standard with his responsibility to apportion the damages under a contribution bill of any kind.

Senator METZENBAUM. Do you agree with that, Mr. Reed?

Mr. REED. I think it would make it more difficult for a court to approve a settlement. Under existing law, a court can look at a settlement and take into consideration factors such as relative culpability, relative ability to pay, relative profit earned by a defendant from the conspiracy. Those are things which a court in considering its settlement can allow to enter into its consideration in determining whether the settlement is fair to the class and fair to the defendant who entered into it. Under S. 995 with its rigid rule, those factors could no longer be considered.

Mr. MONK. Senator, we are going to be involved in litigating for every defendant how much his culpability is whether we settle with him or not. That is what it comes down to. That obviously is going to deter prompt resolution of price-fixing damage cases.

Senator METZENBAUM. You probably know that there is a proposal to make S. 995 retroactive. Will this affect any of your pending cases and, if so, how will they be affected?

Mr. MONK. The answer is obviously yes, it will. We have one case right now, as I mentioned earlier, which is a case involving demolition contractors for bid-rigging in Baltimore. We settled with 11 or so of the 17 defendants.

Our settlement has worked in such a fashion that we have been working toward the deepest pockets and at the same time working toward the defendants with the greatest culpability. If S. 995 is made retroactive, we are going to be faced with a situation where the claims that we have already settled will be set off against the remaining claims. I am not so certain that our final recovery will be sufficient to even cover single damages in the case.

Senator METZENBAUM. Mr. Reed, what price-fixing cases were you involved with while working with the Arizona attorney general?

Mr. REED. Price-fixing lawsuits, damage lawsuits against the dairy industry in Arizona, against the bakery industry in Arizona, against the ready-mix concrete industry in Arizona, and against the cement industry nationwide, the sugar industry nationwide, and the paper products industry nationwide.

Senator METZENBAUM. Those cases were brought on behalf of the State as a purchaser of goods and services; is that right?

Mr. REED. In each of those cases the actions were brought by the State, by other private plaintiffs, on behalf of various groups. It essentially constituted all purchasers of the products involved.

Senator **Metzenbaum**. I assume you settled some of those cases. Do you think your settlement negotiations would have been affected if S. 995 had been the law?

Mr. **Reed**. Absolutely. Most certainly. I think I would have been unable to accommodate some of the smaller, less guilty, less able to pay defendants that were involved in those cases.

Senator **Metzenbaum**. The small business people would have been kept in the cases with the attendant legal expenses if S. 995 had been the law?

Mr. **Reed**. Absolutely; the attendant legal expenses and the attendant exposure to a treble damage judgment, because by holding them in to a treble damage judgment would be the only means that I could get the full recovery for the members of the class and the individual plaintiffs who sued.

Senator **Metzenbaum**. Some of those small business people unquestionably would be adversely affected in their banking relationships when there is a potential liability involving hundreds of thousands or millions of dollars in a pending lawsuit; is that correct?

Mr. **Reed**. Most certainly; that has been my experience in those lawsuits and my experience in private practice.

Senator **Metzenbaum**. Would you agree with that, Mr. Monk?

Mr. **Monk**. Absolutely, Senator. We have a case right now involving numerous small defendants, 50 or so. It involves a conspiracy that we have alleged involving a five-State region. The total joint and several liability facing these small automobile dealer defendants is substantial and their ability to obtain financing has been adversely effected.

In that case under present law if we settle with any one of the small defendants—these are automobile dealers—their liability is limited to the amount of their settlement. However, under S. 995 because of the facts of this particular case they will be faced with claims brought by plaintiffs in the other States. Because we are going to have to litigate that to a conclusion to determine how much of our damages are attributable to them. When we do that, we will establish their liability to everybody else who purchased from a co-conspirator, not just the people from the State of Maryland with whom they are settling. That fact, that note on their financial statement, is going to have an unbelievably disastrous effect on their banking relationships and their ability in the automobile industry to obtain financing to buy cars.

Senator **Metzenbaum**. Thank you, gentleman. Your entire statements will be included in the record.

Mr. **Monk**. Thank you, Senator.

Mr. **Reed**. May we have leave to supplement our oral testimony today with further written statements?

Senator **Metzenbaum**. I just indicated that your entire written statement will be included in the record. Are you talking about an additional written statement over and above that which you have submitted?

Mr. **Reed**. Yes, I am, Senator.

Senator **Metzenbaum**. Without objection, so ordered.

Mr. **Reed**. Thank you.

[Prepared statements follow:]

TESTIMONY OF CHARLES O. MONK, II, CHIEF, ANTITRUST DIVISION OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE CONCERNING S.995 CONTRIBUTION IN ANTITRUST LITIGATION

Mr. Chairman and members of the Committee: I am pleased to be here today to express the views of a State antitrust lawyer on S. 995, legislation concerning contribution among antitrust defendants. Although this measure is frequently called the "contribution bill," I think a more appropriate name for it would be the "Price-Fixer's Relief Act of 1981." In my view, S. 995 will hinder both private and public enforcement of section 1 of the Sherman Act. If enacted, it will unnecessarily complicate antitrust damage litigation, inhibit and confuse the settlement process, and substantially diminish the deterrent effects of the treble damage claim. It is legislation that will benefit only those that have chosen to break the law. It is, indeed, a "price-fixer's relief act."

It has been suggested in prior testimony that it is only "fair" to permit contribution among price-fixers. From the prospective of an antitrust prosecutor, it would seem just as fair to permit contribution among embezzlers or other white collar criminals. Let's not forget that when we are talking about price-fixing we are talking about the most serious antitrust violation, one that subverts the basic remedy. "Private" actions of this type are an important part of the overall antitrust enforcement scheme. In these actions we frequently obtain testimony about the illegal conduct under investigation by agreeing to settle our claim against one member of a conspiracy. We trade forbearance of suit for cooperation. We can only afford to do this because the general rule applied in antitrust cases is that conspirators are jointly and severally liable. Thus, we can recover the full amount of the damages attributable to the settling conspirator from the remaining conspirators.

The set-off penalty imposed on the settling plaintiff by S. 995 will confuse and undermine this type of settlement. It would require the plaintiff to attempt to weigh the possible amount of treble damages that might be attributable to the cooperating conspirator before agreeing to settle. This will be extremely difficult to do at the early stage of an investigation where settling for cooperation can make or break the chances of making your case. Consequently, under S. 995, we will be forced to buy a "pig in a poke" if we want to settle for cooperation early in an investigation. The obvious result is that we will be a reluctant to commit to early settlements. In short, the settlement process will be greatly complicated by the necesssity to calculate the amount of set-off that might be found after trial on the merits and, thus, antitrust enforcement will suffer.

I have heard the argument that contribution increases the potential that each conspirator will be required to pay for his illegal conduct and thus increases the deterrent affect of the treble damage suit. This argument is not completely illogical. It overlooks, however, the practical realities of treble-damage litigation. Few price-fixing cases are tried. Most settle because of the risk of joint and several liability confronting the defendants. In many cases in order to settle each defendant must make peace with the plaintiff and, thus, pay for his illegal conduct. There are few, if any, cases where price-fixers go "free."

As a State antitrust lawyer charged with the responsibility of recovering overcharges paid by Maryland governmental entities, I am seriously concerned about the detrimental affect that S. 995 will have on the plaintiff's ability to obtain prompt, reasonable settlements in price fixing cases. We frequently bring antitrust actions in the federal courts that are not "coattail" actions. That is, they are suits that we have initiated as a result of investigations we have conducted, not suits following Federal government prosecutions. These suits, of course, represent exactly the kind of "private" antitrust enforcement that Congress originally sought to encourage by adopting the treble damage premises of our free enterprise economic system and causes millions of dollars of overcharges to be imposed upon American industry. When a group of competitors get together at a secret meeting and conspire to fix the price of a commodity or service or conspire to rig bids, it weakens our economy and hurts every taxpayer. Their conduct is inherently unfair to all honest businessmen with whom they deal. It is not fair to the price-fixer's customer to be denied the benefits of free and open competition and be forced to pay excessive prices. Consequently, I see no reason to impose new complications on antitrust damage litigation in order to be "fair" to these law breakers.

By permitting suits for contribution among price-fixers, S. 995 serves only to diminish the potential financial liability resulting from a price-fixer's illegal activity. As a result, it will weaken the overall deterrent affect of the treble damage claim. Businessmen are risk-adverse. Thus, the greatest deterrent results from the imposition of the greatest potential for financial penalty. The fear of being "stuck" with paying for three times the injury caused not only by a businessman's own illegal conduct but also by that of his co-conspirators is undoubtedly a meaningful deterrent. Because S. 995 would diminish that possibility by limiting the price-fixer's liability to three times the injury he caused, it reduces the risk and thus weakens the in terrorem affect of the treble damage claim.

S. 995 requires the court to determine how much damage is attributable to each conspirator's conduct. This additional burden will greatly confuse and lengthen treble damage litigation. It should be obvious that antitrust litigation is already too long and complicated. Moreover, this calculation must be made whether a conspirator has settled or not. Rather than being able to put a case behind him, a settling defendant will be faced with the prospect of having his culpability tried without being able to defend himself. He will find that his records must be used in court and his employees will be called to testify. This obviously is not an settlement-encouraging prospect.

Mr. Chairman, this concludes my prepared presentation. I would be happy to respond to any questions the Committee may have.

TESTIMONY OF KENNETH R. REED

Mr. Chairman and members of the Committee on the Judiciary:

I appreciate the opportunity to appear before the Judiciary Committee this morning to express my views on the Antitrust Equal Enforcement Act of 1981, S. 995.

Until returning to the private practice of law a few months ago, I had spent more than five years as Chief Counsel of the Antitrust Division of the Office of the Attorney General of Arizona. As an antitrust prosecutor and as one who has been primarily engaged on the plaintiff's side of antitrust law suits, I must confess to having some natural skepticism about any proposal made to ease the penalties for antitrust violators. Although the supporters of S. 995 apparently view the bill as a price-fixers' relief act, it is not merely my natural skepticism about such measures that leads me to oppose this legislation.

It is with no small measure of irony that I -- as an antitrust prosecutor and plaintiff's attorney -- oppose this bill precisely because it fails to satisfy the stated objective of providing a measure of relief to deserving categories of antitrust violators. Apart from this objection, there are other technical deficiencies in this bill which should be considered and corrected in any contribution bill reported out by this Committee.

I.

This Committee has already heard the able testimony of Assistant Attorney General William F. Baxter on April 22 why, as a general proposition, the penalties on price-fixers should not be eased and why it would be ill-advised to create disincentives for settlements in antitrust cases. I suspect that many of the other witnesses today will be making the same points. While I agree with and endorse these propositions, I will not repeat the arguments being made by other witnesses. My point is a simpler and more practical one and it is founded on a fundamental fallacy implicit in S. 995.

S. 995 seeks to mandate equal treatment of all "persons who are subject to liability for damages attributable to an agreement to fix, maintain or stabilize prices." With the right of contribution, these persons will be liable for damages either to the plaintiff in the primary action or to their co-conspirators in an action for contribution only "according to . . . each such person's sales" and without regard to "whether or not an action has been brought or a judgment has been rendered against [them]."

This mandatory equality might make some sense if all of the conspirators in every price-fixing conspiracy were, in fact, equal. If the conspirators had the same degree of culpability, if they had the same ability to pay, and if they each profited in a like amount for each unit sold them it would be perfectly logical to enact S. 995 and require that each conspirator answer in damages proportionally to the amount of its sales. This type of idealized and equal world does not even exist in the theoretical models of economists, however. In the real world and, indeed, in credible economic models there are differences between the different sellers in the marketplace.

Culpability is not always the same for all of the participants in a conspiracy. One who is unwillingly coerced into joining an unlawful combination is just as much a member of that conspiracy as its ring-leader. Indeed, it is a well-established rule that once a conspiracy is proven by competent evidence, it requires very little additional evidence to prove that a relatively peripheral party is a member of the conspiracy. E.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948); Phelps Dodge Refining Corp. v. Federal Trade Commission, 139 F.2d 393, 396 (2d Cir. 1943). So, too, with ability to pay and the amount of profit earned on each unit of a price-fixed product sold. It would be startling to find an industry where all of the participants had the same net worth or the same unit profit.

What S. 995 would do would be to mandate equality based solely upon relative sales and to prohibit any consideration of these demonstrable differences. If this artificial equality is not required, differences in culpability, in ability to pay, or in the amount of unjust enrichment resulting from the conspiracy could all be taken into consideration either in a plaintiff's settlement strategy or in defendants' sharing agreements. Although General Bell has criticized so-called "sweetheart settlements," a plaintiff can now agree to favorable terms with a relatively impecunious defendant with the confidence that wealthier defendants will remain liable for any damages attributable to the settling defendant's sales. The same considerations apply to sharing agreements frequently entered into by antitrust defendants. So long as peripheral defendants retain the credible threat of pursuing early settlements with the plaintif, they have the negotiating leverage to demand and obtain from the hard-core defendants more favorable terms in any sharing agreement than might otherwise be the case.

I do not believe that an Act of Congress should mandate contribution based upon culpability, ability to pay, or amount of unjust enrichment any more than I believe that contribution based upon market share should be required. Neither a statutory nor a judge-made rule of contribution can have the flexibility necessary to deal with the myriad combinations of possible contribution criteria which will occur in different conspiracies. One system which can adequately deal with these different criteria is private decision-making where both plaintiffs and defendants are allowed to make reasoned distinctions in their settlements and sharing agreements. In a day and age where I am pleased to see greater faith placed in private decision-making and less reliance upon governmental regulation, I would think that a system of apportioning damages which allowed the greatest possible measure of flexibility would commend itself to this Committee.

II.

If a contribution bill is to be reported by this Committee, there are a number of technical deficiencies in the present bill which should be considered and corrected.

The most important of these in my mind is the failure of S. 995 to address the question of multi-district litigation. If defendants are to be allowed to seek contribution from unnamed co-conspirators, it would be not unreasonable to suspect that some of these co-conspirators might reside beyond the territorial reach of process of the court in which the original action was first brought. In such cases, the defendants seeking contribution might be forced to go to a second district to obtain jurisdiction over the co-conspirator. While the multi-district litigation statute, 28 U.S.C. § 1407, provides a vehicle for coordinating in a single district the pretrial proceedings in such actions, present law does not provide an adequate procedure for permitting joint trials.

The amendment of section 1407 was last considered by this Committee in the context of the proposed Illinois Brick legislation. While there was a sharp split over the wisdom of overruling Illinois Brick, there was virtual unanimity among witnesses and members of this Committee that section 1407 should be amended to allow the Judicial Panel on Multidistrict Litigation to consolidate antitrust cases for trial as well as for pretrial proceedings. I served, for example, on the committees of both the American Bar Association and the National Association of Attorneys General which considered the Illinois Brick bills and both of these groups unanimously endorsed the amendment of section 1407.

There was a compelling case for amending section 1407 when the only issue involved was avoiding or minimizing duplicative recoveries. Those reasons still support the amendment of section 1407. If we are now to have a right of contribution and the increased probability of multi-district lawsuits, then the need for amending section 1407 becomes all the more critical.

Another technical problem with S. 995 is the fact that the right of contribution arises whenever there is "an agreement to fix, maintain, or stabilize prices." As Robert D. Joffe correctly pointed out in his testimony before this Committee on April 22, 1981, agreements "to fix, maintain, or stabilize prices" could embrace virtually the entire spectrum of per se violations of section 1 of the Sherman Act. Mr. Joffe cited as examples of agreements "to fix, maintain, or stabilize prices" vertical price-fixing cases such as Albrecht v. Herald Co., 390 U.S. 145 (1968), as well as horizontal customer or territorial allocations. Mr. Joffe was correct to say that contribution should not be allowed in such cases and certainly not a right of contribution based upon relative market shares.

The consequences of Mr. Joffe's argument should lead one to consider whether it is appropriate only to allow contribution in horizontal price-fixing cases. Agreements among competitors on the prices they will charge their customers have to be the most hard-core type of violation of section 1 of the Sherman Act. It seems to be a misplaced sense of priorities to allow contribution in horizontal price-fixing cases under the justification of easing the burden on antitrust violators while denying contribution in the case of less egregious violators which are unlawful only under the Rule of Reason rather than the per se rule or even in some types of per se violations such as vertical price-fixing which some economists would argue can have pro-competitive effects. Whatever leniency is to be extended to antitrust violators should not be given first to those whose misdeeds are the most flagrant.

I shall be happy to answer whatever questions the Committee may have.

Senator **Metzenbaum**. Our next panel consists of three private attorneys: Mr. Josef D. Cooper of San Francisco; Mr. Harold Kohn of Kohn, Savett, Marion & Graf, Philadelphia, Pa.; and Mr. Granvil I. Specks of Specks & Goldberg, Chicago, Ill.

STATEMENT OF HAROLD E. KOHN, LAW FIRM OF KOHN, SAVETT, MARION & GRAF, PHILADELPHIA, PA.

Mr. **Kohn**. Mr. Chairman, if I may begin, first briefly regarding my experience, I have been practicing law for some 43 years. Much of that time has been spent in antitrust matters. I have represented plaintiffs. I have represented defendants. I have represented business interests and others who were seeking advice with respect to the antitrust laws completely independent of any litigation. I have been practicing, as I say, in Philadelphia. I have an office in Washington. We have participated in matters throughout the Nation.

Probably close to half that time I have appeared before your honorable committee. I think Mr. Chumbris can vouch for my many appearances beginning back in the old days when Senator Hart was the chairman of the subcommittee.

Senator **Metzenbaum**. Mr. Kohn, Mr. Cooper, and Mr. Specks, I have just been informed that there probably will be a rollcall vote in about 15 minutes. Inasmuch as all of you have come long distances, I would appreciate all of you confining your preliminary remarks to a firm 5 minutes.

Mr. **Kohn**. Senator, let me get to the heart of the matter. I think your question to one of the preceding witnesses goes to the heart of the matter: Can you draft a fair contribution bill?

I do not think you can draft a fair one, and I do not think you can draft a meaningful one. While I do not want to start out by fighting with you when you said there are two sides to this question, if you look at S. 995, I say smiling, but nevertheless meaning it, that there is really only one side to the "drafting" issue.

Take a look at the operative language on page 2, lines 2 and 3: "damages attributable to each such person's sales or purchases of goods or services." What do you mean by "attributable"? That is not a word of art. It is not in the act. It is not legal. It is not equivalent to words like "cause."

What do you mean by "sales"? Do you mean unit sales? Do you mean dollar sales? Do you mean sales to these particular plaintiffs? Do you mean sales to other people in the industry? Do you mean sales abroad? What precisely is meant? I say that one phrase alone is going to give rise to years of litigation.

Take, for example, the experience we had in the plywood case. Many of the companies did not sell anything of any consequence to the people who would be the plaintiffs. Most of their sales was to other defendants. Those other defendants had sales grossly disproportionate to their own production.

I do not mean to solve that question; I merely mean to illustrate the problems that you have before you.

Many industries are similar and many industries have other peculiar conditions of their own which will make it impossible to administer this act.

Over what period are the sales to be taken into account? Is it the period in suit, which may be 15 or 20 years? Is it the period of the usual settlement, which may be 4 years? Is it the period the court finally says you can present claims in a class action? That also remains undefined in S. 995.

Assuming you are going to take dollar figures or assuming you are going to take unit figures, suppose one particular defendant has sold at a price substantially less, either throughout the period in question or during part of the period. Has he caused more or less damage?

Then, finally—and some of my good friends of the defense bar are in court today—I have yet to see the situation where, whether you were concerned with unit, dollar sales, or whatever, you could get any figures which the others would agree to. They can apparently agree among themselves when they have a sharing agreement, but they can never agree when the matter is in litigation. One wants to reduce the figures by discounts. One wants to reduce intercompany sales and the other does not. They can never agree on the actual dollar figures, strangely enough, although they obviously must know them in connection with their own business.

Drop down to lines 17 and 18. I do not mean to be facetious, but this would seem a problem which would not disturb anybody of good will or commonsense. However, as I say, my friends on the other side having practiced for a long, long time, I am sure they are quite capable of litigating the following problem for at least 2 years and I do not know how many millions of dollars of counsel fees.

Up above in 2 and 3 it says, "according to the damages attributable to each such person's sales." In lines 17 and 18 it says, "treble the actual damages." Is that meant to be a significant difference or isn't it?

It may seem like the medieval dispute about how many angels dance on a pin, but, believe me, from bitter experience I know that they will argue that the competent draftsman who drafted this act did not insert a provision in one place different from what he did in the other, one dealing with settlement and one dealing with the litigated situation, without including a different result.

Let's talk about what appears on page 1, lines 6 and 7: "liability for damages attributable to an agreement to fix, maintain, or stabilize prices." I think one of the prior witnesses alluded to the problem, the possible confusion, with respect to that clause.

Take, for example, the drug industry where it is not uncommon to have conspiracies or unilateral action which covers patent restrictions. Ultimately that winds up in an agreement to fix and stabilize prices. Is that to be included or excluded from this particular act?

The phrase "fix, maintain, and stabilize prices" is not in the Sherman Act. That is language which the Government ordinarily puts in its indictment; it puts it in a variety of indictments.

Therefore, I think the bodily incorporation of that phrase into this act will also give rise to a considerable amount of confusion and years of litigation while the poor plaintiff sits there as the cross claims are litigated.

I want to incorporate my written statement into the record together with my testimony when I was before you, Senator Metzenbaum, 2 years ago with respect to the act that was then pending.

I would stress only one thing in that written statement in view of the time limitation. We have lived 90 years under the antitrust laws without any Contribution Act. With the Supreme Court going to render a decision within 1 month, this is certainly not the time to get ourselves into this morass. Let's see what, if any, guidance we get from the Supreme Court, and then the proponents who waited 90 years can wait 9 more months to gestate a bill which may make some sense, although I doubt that anybody can really put all these perplexing problems into a bill.

It is very much like *Illinois Brick*. The reason that a bill to change *Illinois Brick* did not get through was that nobody could draft the bill. This problem is infinitely more perplexing, believe me.

Senator METZENBAUM. Mr. Kohn, you are a brilliant lawyer, but you are totally wrong about why *Illinois Brick* did not get through. It was not a question of drafting it; the people understood it well enough. We just did not have the votes, and that is really what the ballgame is about day in and day out around here—who has the votes.

Mr. KOHN. I stand corrected, Mr. Chairman.

Senator METZENBAUM. All right. Mr. Cooper, we will be happy to hear from you.

STATEMENT OF JOSEF D. COOPER, SAN FRANCISCO, CALIF.

Mr. COOPER. Thank you, Senator.

Rather than repeating what has been said to you, I am going to use two specific cases as an illustration of all of the points which have been made as to why S. 995 would be a bad bill.

In listening to the proponents of the bill talk about the evil of sweetheart settlements and the difficulties where small companies are picked upon and left to pay the great bulk of the settlements or go to trial at the end of a case, or concepts of paying the fair share by each of the defendants, it seems to me that these are all the concepts, all of the attributes of the negotiations which in fact go on today each time there is an antitrust case which is settled.

We have established in our society the antitrust laws, which I believe the Supreme Court has described as the charter of our economic liberty. We have said that the free marketplace should regulate and that the antitrust laws and the settlement through private litigation, whether it is brought by a governmental entity or private party, should regulate the economy to advance the free and open distribution of services and goods.

When a lawsuit is filed, all of the attributes of free market economy come to play in the negotiation of a settlement. If a company is peripherally involved in the conspiracy, it makes those arguments. If a company is impecunious, it makes those arguments.

Each of the reasons why a settlement might be fair or unfair is advanced in the course of negotiations between the lawyers. If this bill were passed, it would preclude, it would forbid forever, the arguments which can be made by peripherally involved companies to get a better deal. It would preclude arguments which can be made by small companies to get a better deal.

I would like to refer to one specific case to illustrate that. Mr. Reed referred to the bread litigation in Arizona, in which I was also very involved. That was a case where there were two national companies and two local companies. One of the national companies had two subsidiaries, so there were really five sellers in the marketplace.

The two local companies, both of whom were the larger companies in the marketplace—between them they represented approximately 60 to 65 percent of the market—had difficult financial positions, one more than the other. The two national companies had substantially more money, substantially greater ability to pay a settlement, and, perhaps most importantly, their participation in the conspiracy was absolutely necessary for there to be a conspiracy. If the two national companies had not agreed to a conspiracy, had not participated, there would not have been one. The purchasers of bread in Arizona would not have been overcharged.

When those settlements were negotiated, the two companies which represented approximately 60 to 65 percent of the market made the arguments that they were smaller, that they did not have the economic resources. In the case of one company, it made a showing through its accountant—and the plaintiffs hired an accountant to study their books—that it could not afford the settlement. The result was that those two companies paid $1.1 million out of $6 million in settlements.

Counsel had the flexibility to obtain the recovery from the people who could pay it. Counsel had the flexibility because the sales from those companies who did not have funds to reimburse to the injured parties were going to remain in the litigation, leaving plaintiffs' counsel with the capacity to obtain recovery on their sales from the companies who were nationwide and who did have the funds.

The second example that I would like to make picks up from Mr. Kohn's comments on the flaws in the language of the bill. One of the attributes of the bill to which he did not refer is the question of what is the market that we are talking about.

Then there is one particular case that I think illustrates this as well. There is a case in Arizona in which I am currently involved which relates to a price-fixing conspiracy with regard to escrow rates charged when someone purchases a house.

There is one company—there are actually two or three, but one in particular which comes to mind—which represents about 5 percent of the market insofar as the sale of title policies but has elected, rather than having its own representatives provide the escrow services, to have an agent provide the escrow services. This is a company whose representatives sat in meetings, voted on prices that were going to be charged for escrow services, but itself does not provide escrow services.

I would suggest that the proper result is that that company, whose participation in the conspiracy is vitally important, should in fact be liable for some of the damages. If S. 995 is passed, I would suggest at a minimum there is going to be litigation over whether they are liable, and probably the result would be, inasmuch as they do not provide escrow services, that they have no responsibility.

It seems to me, in closing, that the basic attitude which is behind S. 995 is that price-fixing, after all, is not such a bad thing or at least is not so bad that companies should be put at risk for the economic health of their company. I would suggest that is contrary to what the law should be.

Thank you.

Senator **Metzenbaum**. Thank you very much.

The statements of all three of you gentlemen will be included in the hearing record following your oral presentations.

Mr. Specks, we are very happy to welcome you, sir.

STATEMENT OF GRANVIL I. SPECKS, LAW FIRM OF SPECKS & GOLDBERG, LTD., CHICAGO, ILL.

Mr. **Specks**. Thank you, Senator.

As the Senator well knows, I am a lawyer practicing in Chicago, Ill. with the firm of Specks & Goldberg, Ltd. In our law firm we represent plaintiffs in antitrust and securities litigation.

I appreciate and accepted the invitation late Thursday afternoon to appear on this panel because I believe that the proposed amendment has serious flaws and should not be passed.

The first paragraph of the bill which provides for contribution among defendants and co-conspirators will create a judicial nightmare. This may be graphically illustrated, Senator, by reference to the corrugated container antitrust litigation, where I am a member of the plaintiffs' steering committee.

In *Corrugated* the bill of particulars named approximately 800 coconspirators. If this bill had been in effect when the *Corrugated* cases were filed, a defendant in order to protect itself would have to assert claims for contribution against the other 799 co-conspirators that were named in that bill of particulars.

Second, the carve-out provision in the second paragraph of the bill will unduly interfere with the manageability and settlement of antitrust actions, I believe to the prejudice of small companies having a limited ability to pay, to the prejudice of the less culpable defendants, to the prejudice of defendants which may be hardship cases, and to the prejudice of the early settler.

Where, for example, a small company has a limited ability to pay but a large market share, the mandatory carve-out provision may require the plaintiffs and the court to reject a settlement which the small company defendant could otherwise obtain in good faith negotiations with the plaintiffs' counsel.

The deterrent effect, I submit, of the antitrust laws is not to be furthered by a bill which compels settlement demands which may result in driving small company defendants out of business.

Third, the arbitrary sales formula in the bill will operate to the prejudice of a small company with a limited ability to pay but a large market share, to the prejudice of defendants which are hardship cases, and to the prejudice of defendants which are less culpable.

In all recent major class action antitrust litigation, such as folding cartons and corrugated, there have been hardship settlements. Absent a mandatory carve-out provision based on sales, these defendants would be in a position to negotiate a much more favorable settlement than will be possible under the bill.

To protect the small companies, hardship cases, and the less culpable defendants, contributions should be discretionary with the court if we have to have contribution. I want to make it clear, Senator, that I am unalterably opposed to contribution.

Senator METZENBAUM. I did not hear the last part of your sentence. Unalterably opposed to what?

Mr. SPECKS. To contribution.

At the present time, two or more defendants may limit recoverable damages among themselves by entering into a sharing agreement if and to the extent that a defendant deems that sharing agreement to be in its best interest. In view of the different kinds of situations that arise, Congress should not impose an ill-advised, arbitrary sales carve-out provision where defendants can presently accomplish the very same thing by a sharing agreement if a defendant, in the exercise of its business judgment, determines that a sharing agreement is in its best interest.

I do not think that freedom of choice should be denied to the small businessman or to the hardship case or to any other defendants involved in a piece of litigation.

As has previously been indicated, the contribution issue is presently before the Supreme Court in *Texas Industries*. I submit, as Mr. Kohn did, that we should not pass an ill-advised bill at this time while that decision is pending.

If after the decision Congress should decide to go ahead, then I think much more thought should be given to all of the considerations that go into settlements in antitrust litigation, particularly class action antitrust litigation where you consider many factors, not just market shares, but degree of culpability, the net worth of the defendant, the overall ability to pay, the probability of success on liability and damages, and if you are settling before a class has been certified, your exposure on whether or not you will get a class.

There are so many factors that are considered by sophisticated plaintiffs' and defendants' lawyers that it is not possible to draft a bill which will incorporate all those factors and reflect the realities of the marketplace in which we are dealing.

Thank you.

Senator METZENBAUM. There is a rollcall presently in progress on the floor, so I will be very brief.

Mr. Cooper, can you give the committee examples of price-fixing cases which would have been substantially complicated and lengthened if S. 995 had been law?

Mr. COOPER. I think the one that I mentioned before, the bread litigation, was certainly one of the clear examples of it. There are other cases where similar problems would have existed.

One that comes to my mind is the folding carton litigation, for example, where a significant issue arose over whether or not milk cartons which were specifically excluded from the Federal Government's indictment should be included in the litigation. In the course of negotiating those settlements, the marketplace in which the lawyers were functioning placed a value on the evidence that was available to substantiate a conspiracy, which included folding cartons, and what the economic value of that evidence was. There was ultimately a settlement which included milk cartons even though as the litigation began the Government had not believed that should have been part of the market.

If S. 995 were in existence, you would have to litigate whether that type of product was even included within the market that was relevant for purposes of contribution before you reach the question of whether or not there should be a settlement or go to trial on that issue. There are many others.

Senator METZENBAUM. Who are the typical plaintiffs in a price-fixing case—small business, large business?

Mr. KOHN. All kinds, sir. Most of them in the class suits are the smaller businesses, but you have a great many major corporations which conduct their own litigation because, rightly or wrongly, they do not think that the class action suits have produced enough by way of recovery for them.

In the folding carton case you have a perfect example of that. I think you have Pillsbury and some of the major cereal companies who were not satisfied with the class settlement and are pursuing their own remedies. You see it more and more.

Basically, you do have the two types—small and today large on their own behalf.

Senator METZENBAUM. Mr. Specks, do you think S. 995 will make settlements more or less likely?

Mr. SPECKS. I would say, Senator, that with the bill as drafted you will have settlements—don't get me wrong—but it is going to make settlements much more difficult. It is going to make it much more difficult to have partial settlements.

It will make it much more difficult for a court to be able to approve partial settlements. I think he would be placed in a position under this bill where you have partial settlements of having to show either hardship, a far lesser degree of culpability, inability to pay, et cetera, than you would otherwise be.

The bottom line of the bill will be that there will be many antitrust class actions in which you will not have partial settlements because this bill will in effect force the plaintiffs to try to work out an overall settlement which is not in the public interest of the class. An overall settlement with a sharing agreement under this bill reduces itself to the lowest common denominator, so the cheapest guy in the bunch will dictate the settlement.

Senator METZENBAUM. Thank you, Mr. Specks.

I am going to ask each of you a question which just takes a yes or no answer. Then I am going to turn the questioning over to Senator Grassley, so that he may also get to the floor to vote.

In your long experience as a plaintiffs' antitrust lawyer, do any of you know of any small or large defendant that was put out of business by a settlement or a judgment against it in a price-fixing case? Do you know of anybody who was forced out of business by reason of a settlement?

Mr. COOPER. No, sir.

Mr. KOHN. No; absolutely not.

Mr. SPECKS. Absolutely not.

Senator **Metzenbaum**. Senator Grassley, would you be good enough to ask questions and adjourn the meeting when you are finished?

RETROACTIVE BILL

Senator **Grassley**. I only have one question.

Mr. Kohn, there has been a suggestion made that this bill should be retroactively effective. In your opinion, would the settlements made by some defendants in the *Corrugated* case you refer to on page 4 of your statement be good faith settlements under this bill?

Mr. **Kohn**. In my opinion, counsel for some of the defendants in the *Corrugated* case have already indicated that they expect prolonged litigation with respect to the prior settlement if S. 995 should become law. Therefore, I think the answer must be that there will be litigation. Whether they will ultimately be held to be good or bad faith settlements is a matter which we can only conjecture.

One thing we can be sure of is that there will be years of litigation during which the money will be denied to the class members who are entitled to it. That is an additional reason why I think this bill, even if it should pass—and I hope it will not—should by no means be made retroactive. I think that would be a horrible situation leading to infinite complexity not only in that case but in many other cases, some of which have reached the stage of *Corrugated* and some of which are on their way to the *Corrugated* stage.

Senator **Grassley**. Thank you, Mr. Kohn. Thanks to all of the witnesses on the panel for your testimony and attendance at the hearing.

As standard procedure, there may be questions from other Senators that will be submitted for the record which you will be called upon to answer.

We will recess this hearing subject to the call of the chairman.

[Whereupon, at 11:15 a.m., the committee recessed, to reconvene at the call of the Chair.

[Prepared statements of Harold E. Kohn and Josef D. Cooper follow:]

PREPARED STATEMENT OF HAROLD E. KOHN

I

I am a member of the firm of Kohn, Savett, Marion & Graf, P.C., with offices in Philadelphia and Washington, D. C. I have been actively engaged in the practice of law for more than 40 years and have had extensive experience with antitrust litigation. During that time, I have participated in many of the more significant antitrust cases, including the trial, on behalf of Philadelphia Electric Company, of the first electrical equipment case, against General Electric, Westinghouse and other manufacturers, in 1964. Recently, I tried the Plywood case before a jury against the Georgia-Pacific, Weyerhaeuser and Williamette corporations.

In the past 15 years I have testified on numerous occasions before the Antitrust Subcommittee of your Committee and other Congressional Committees, and have participated in lectures, panel discussions, seminars and other continuing education programs sponsored by the American Bar Association and other bar associations, law schools and other organizations.

While I am sometimes thought of as a member of the "plaintiffs' Bar" (if the Bar is to be segmented in that manner), my firm and I have always represented a substantial number of "New York Stock Exchange" and other large corporations in antitrust and other matters, including antitrust litigation in which they have been defendants.

II

Two years ago, when a prior Bill to establish contributions was before your Committee, I testified in opposition to the proposed legislation. Attached is a copy of the statement filed by me at that time. My oral testimony is reported at length in the transcripts of the hearings, Serial No. 96-27, June 8 and 12, 1979, the First Session on S.1468, pages 91-109. Subsequently, I wrote to the Judiciary Committee under dates of June 19, and 22, 1979. Those letters appear at pages 186-6 and 188-191 of the same printed transcript.

III

At the outset, let me say that this is a particularly inappropriate time to enact such legislation. There is now pending before the United States Supreme Court a case arising out of the Corrugated Antitrust litigation, together with companion cases, in which the issue of contribution has been briefed and argued. The cases are awaiting decision. It is no exaggeration to say that the present Supreme Court is not generally regarded as unsympathetic to the legitimate interests of the business community. There is no valid reason why Congress should not await the ruling, and whatever guidance may be received from the opinion which may be rendered by the Court on this issue, in all probability, within the next month or so.

Legislation, and particularly a Bill in the present form of S.995, on the contrary, is bound to give rise to years of litigation.

IV

Next, let me comment briefly with respect to the testimony before your Committee on April 22, particularly, the testimony of Honorable Griffin B. Bell and of Messrs. Kress and Johnson of the Green Bay Packaging, Inc. and Menasha Corporation, respectively.

To the extent that this testimony states or implies that any corporation or other defendant has ever been put out of business because of a judgment or settlement in a price fixing antitrust case, it is simply incorrect. No defendant, to my knowledge, has ever been put out of business as a result of any such litigation. Such testimony is not founded in fact, and should be disregarded.

Indeed, it has been my experience over a period of more than 20 years, that such litigation has resulted in a closer examination by defendants of the efficiency of their business practices, because they can no longer shelter themselves behind a wall of conspiratorial pricing. Such examination has resulted in many corporations emerging stronger than they were before. That is definitely true of Westinghouse, as a prime example, and there are many others whose experience has been the same.

Nor is it true that settlements have been excessive or extortionate. The settlements in the Corrugated case to which these witnesses allude were challenged by certain plaintiffs on the ground that the settlements were inadequate, were too low to be fair to the plaintiff class as required by Rule 23 of the Federal Rule of Civil Procedure. The Court of Appeals for the Fifth Circuit has remanded the matter to the District Court for specific findings of fact bearing upon this issue, which would tend to indicate the opposite of the impression these witnesses sought to leave with your Committee.

In the current Folding Cartons litigation in Chicago, and in other suits, including Corrugated Boxes, Gas Meters and Sugar, many major corporate claimants have refused to accept the class settlements, on the ground of their inadequacy, and have recovered amounts substantially in excess of what they would have received under the class settlements. This, too, would indicate that responsible businessmen in some of the nation's largest corporations do not believe that lawyers in class actions are making extortionate demands of price-fixing defendants.

Finally, in considering the prior testimony, it is an ancient maxim that the bias of the witness must be taken into account. At the outset of this presentation, I stated my own predilections. It must be remembered that former Attorney General Bell is no longer the Attorney General. He is a member of a large law firm, King & Spalding, a substantial part of whose practice is the representation of defendants charged with price-fixing violations of the antitrust laws. The firm has represented defendants in the Folding Cartons and other recent matters. So far as I know, they do not represent plaintiffs in price-fixing cases.

The interest of Messrs. Kress and Johnson is also manifest from their testimony. Incidentally, it should be noted that their corporations are still in business, and are by no means the miniscule "Mom and Pop" enterprises they would imply.

V

In summary, for nearly a century the Sherman Act has been in effect without contribution and without a single instance in which a price-fixing defendant has ever been put out of business or cripped as a result of such litigation. Today, with rampant inflation, with increasing oligopoly in so many lines of commerce, and with the issue under active consideration by the United States Supreme Court, there is no reason whatsoever to grant encouragement to price fixers.

S.995 should be tabled.

Testimony of Josef D. Cooper
Before the Senate Judiciary Committee on S. 995

Mr. Chairman and members of the Committee:

My name is Josef D. Cooper. I am an attorney practicing in San Francisco, California, with the majority of my practice in antitrust litigation. I have been involved in this area of the law since graduating from law school, first while working for the United States Courts, and then, for the last thirteen years, in private practice representing both plaintiffs and defendants. During this period I have actively participated in many of the major antitrust actions throughout the country. I am pleased to be here today to present my views regarding S. 995, a bill which would provide for contribution among defendants in certain antitrust litigation.

Contribution in antitrust actions was considered inappropriate until the decision in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). In that decision, the Eighth Circuit ruled that contribution was permissible at least under circumstances where one of the wrongdoers might otherwise escape all liability. Thereafter, enterprising lawyers rushed to expand the small breach in the dyke to include contribution in horizontal price-fixing cases, which are generally recognized as the most aggregious form of anticompetitive activity. The result of these efforts was uniform rejection by the judiciary,[1] and the introduction of proposed legislation to permit contribution in price-fixing cases.

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[1] The only possible exception to this statement is Little Rock School District v. Borden, Inc., 1980-1 Trade Cases (CCH) ¶63,059 (E.D. Ark. 1979), where the district court, compelled to follow Professional Beauty Supply, ruled that a settlement must release non-settling defendants from liability for settling defendant's sales in order to protect settling defendants from contribution claims.

I understand that S. 995 is intended to apply solely to horizontal price-fixing, although this limitation is not reflected in its language. A vertical price-fixing agreement would also qualify a defendant for contribution under the suggested statute, even though the proposed contribution formula (i.e., each defendant's market share) makes no sense in that context. Without addressing whether limiting the availability of contribution to price-fixing cases denies equal protection to prepetrators of other anticompetitive activities, it is my view that the concept of contribution is totally inappropriate in the context of the antitrust laws. This is and particularly so with regard to price-fixing conspiracies, the one illegal activity covered by S. 995.

The doctrine of contribution arose in English Common Law as a means for providing justice among unintentional or negligent tortfeasors. Contribution was not available for intentional tortious conduct, such as price-fixing, which distinction has essentially continued to this day. (See, Restatement (second) of Torts, Section 886(a) (1977), Restatement of Restitution, Section 140 (1937), and Uniform Contribution Among Tortfeasors Act, Section 1(b).) Accordingly, S. 995 would inappropriately engraft principles of fairness which evolved with regard to accidental injury onto purposeful and knowingly illegal conduct. As the Supreme Court of the United States observed in United States v. United States Gypsum Co., 438 U.S. 422, 455 (1978):

> In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negeligence have no place.

Horizontal price-fixing is perpetrated by concerted action or "conspiracy," a concept derived from the criminal law, which at the very least implies intentional conduct. In a conspiracy, each of the conspirators acts with the intent of manifesting the object of the conspiracy. For this reason, under criminal law each conspirator, regardless of his individual actions, is subject to punishment as though he had personally committed all of the acts required to effectuate the conspiracy. While there may be relative degrees of "action" among co-conspirators, there are no relative degrees of "fault," since whether one acts or another acts for him, each intends that the action take place. This is also true of intentional torts which do not require conspiracy. If "A" intends to injure "B", it matters little whether the injury is accomplished by "A" shoving "B" into a brick wall, or onto a knife held by "C".

Therefore, when proponents of this bill state that no defendant should be required to pay more than "his share" of the damages, they are either ignoring substantive conspiracy law or admitting that contribution is inappropriate. No antitrust conspiracy, least of all a price-fixing conspiracy, can cause any damage without all conspirators adhearing to the agreed upon conduct. Since any participant can disrupt the conspiracy by lowering his price, he "causes" the total conspiracy to function in order to realize the increased profits on his own sales. Accordingly, the amount of the damages caused by his actions, i.e., "his share of the damages", is 100%, regardless of the percent of product he actually contributed to the market.

When a manufacturer whose sales account for 7% of the market agrees with a manufacturer whose sales account for 40% of the market to an increase of ten cents per unit, each intends that the other receive the higher price. In fact, the 7% manufacturer is consciously agreeing to forego the use of price competition as a means of increasing his market share, and is protecting his co-conspirator's share. His actions have wronged those persons who purchase from his competitor, as directly as he has wronged the 7% of the consumers who purchase from him.

If Congress now permits contribution for the intentional tort of horizontal price-fixing, there would be no legal nor logical impediment to the assertion of contribution claims for any intentional tort. This would be nothing more than a boon to those who are lucky enough to have their intentions carried out by another who is either larger, or whose actions more directly accomplish the goal.

The proponents of this bill argue that there is a need to legislatively correct a situation which is fundamentally unfair to less culpable or smaller defendants. In order to endorse this premise, one must accept as fact that the Courts of Appeal for the Fifth and Tenth Circuits, along with numerous District Courts, including the Southern District of New York,[2] the Northern District of California,[3] the Eastern District of Pennsylvania,[4] the District of Columbia,[5] and the District of New Jersey,[6] have closed their eyes to considerations of fundamental fairness, and ignored the plight of innocent companies caught up in antitrust litigation. In fact, such concern did not even motivate the court in Professional Beauty Supply.

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[2] Sabre Shipping Corp. v. American President Lines, Ltd., 298 F.Supp. 1339 (1969).

[3] El Camino Glass v. Sunglow Glass Co., 1977-1 Trade Cases (CCH) ¶61,533 (1976).

[4] Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cases (CCH) ¶62,717 (1979).

[5] In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (1979).

[6] Newark Motor Inn Corp. v. Holiday Inns, Inc., 1980-2 Trade Cases (CCH) ¶63,465 (1980).

Professional Beauty Supply concerned a situation where the plaintiff wholesaler of beauty supplies alleged that the defendant (also a wholesaler of beauty supplies), had demanded that La Maur, one of plaintiff's suppliers, terminate plaintiff, and give defendant an exclusive dealership in the State of Minnesota. Plaintiff asserted that these demands were made in furtherance of defendant's attempt to monopolize the Minnesota beauty supply market. The defendant sought to assert a claim for contribution and indemnity against La Maur, which allegedly had not been sued because it had agreed to renew plaintiff's franchise. Although the Court did not determine whether this allegation was true, it clearly influenced the Court's decision to permit the contribution claim.

The Eighth Circuit's concern was not that lack of contribution might force a wrongdoer to bear more than its fair share of the damages, but that "a rule which automatically denies contribution to antitrust violators . . . dilute[s] the deterent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing." Id. at 1185. The Eighth Circuit was careful not to enunciate a rule allowing contribution in all circumstances. Rather, it was deviating from the blanket denial of contribution which had been the law. Its reasoning was clearly set forth:

> We are convinced that the result of automatically prohibiting contribution among antitrust defendants in all circumstances would be to allow a significant number of antitrust violators to

> escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws.
>
> * * *
>
> Because of the deterent policy of the antitrust laws, even intentional tort feasors may obtain contribution so that tortfeasors will not escape liability. [Citations omitted.] We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution.

Id. at 1185-86. All courts which subsequently considered the Eighth Circuit's rationale rejected it.

Although acknowledging that there might be instances in which a contribution rule would require an entity to pay money that otherwise would ("because of plaintiff's whim or spite, or his collusion with the other wrongdoer", Id. at 1185-86) never be disgorged, these courts concluded that the potential for abuse, the practical effect upon the conduct of litigation, and the possibility of altering substantive law did not justify contribution. See, Wilson T. Abraham Construction Corp. v. Texas Industries Inc., 604 F.2d 897 (5th Cir. 1979), and Olson Farms Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979).

S. 995 comes from precisely the opposite direction than Professional Beauty Supply. It is not designed to prevent violators from escaping payment, but to protect them from paying too much. While that is arguably a ligitimate Congressional goal, it is not rationally accomplished by this bill.

Traditionally, common law concepts of contribution required that those most at fault, i.e., the person whose actions contributed most to plaintiff's injury, contribute most to plaintiff's recovery. It appears, however, that the proponents of this legislation believe that contribution in an antitrust case cannot practicably be allocated by ascertaining comparative degrees of fault or responsibility for plaintiff's damage. This is consistent with the position of the petitioners and their supporters in Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144, United States Supreme Court, October Term 1980. Everyone seems to agree that, at best, this would require extensive relitigation of plaintiff's case-in-chief, and, at worst, such a determination would be impossible without altering substantive law of antitrust conspiracy (which currently contains no concept that one conspirator can be more or less at fault than another).

Once concepts of comparative fault are abandoned, apportionment of contribution must be made on some statistical basis. The Texas Industries petitioner argues that the appropriate basis is a per capita allocation of contribution, i.e., plaintiff's total recovery divided equally among all joint tortfeasors. Allegedly, this would be equitable since all tortfeasors are equally at fault under the antitrust laws. (That is not quite an accurate statement, since the antitrust laws do not hold that all co-conspirators equally at fault -- they hold that all co-conspirators totally at fault.) The respondents in Texas Industries note that under per capita contribution, petitioner Texas Industries, would keep $50,000 of the $200,000 it had been found to have overcharged plaintiff.

Other antitrust defendants supporting the right to contribution in amicus briefs advocate a market share allocation as proposed in S. 995. This is not surprising for amicus Olson Farms,[7] since a per capita calculation would result in liability for 20% of plaintiffs' recovery. Under a market share allocation Olson would be responsible for only 11%. These shifting percentages demonstrate that neither of these allocation theories are in any way related to fundamental fairness between defendants, nor do they relate to a defendant's ability to pay. It may be more "fair" to Olson to pay 11% than 20%, but I suspect that its co-defendants would not share this view. These allocation methods are merely arbitrary arithmetic exercises unrelated to the activity at issue, or relative culpability of the actors. However, they are, as all proponents of contribution concede, the only workable allocation formulas.

It has been suggested that market share allocation is rational only when applied to horizontal price-fixing cases, and, accordingly, S. 995 is so limited. Yet, horizontal price-fixing is probably the most inappropriate of all antitrust violations for a rule of contribution, since it strikes most directly at the foundations of our society. We have built our political and social institutions upon the premise that through competition, goods and services will circulate at a price which most perfectly reflects their "value" to both purchaser and seller. When this mechanism is disrupted, the person who pays more than the true value of a product is robbed of the concommitant value of his labor. In reality, the price-fixer deprives his victims of their "liberty" by requiring them to labor longer to pay for products purchased in a non-competitive market. Although

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[7] Defendant in Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979).

§(d) of S. 995 denies that it affects joint and several liability, it is, in fact, a repudiation of that concept. It either assumes that one should only be punished in proportion to the amount by which he actually benefitted, or else it assumes that larger companies are always more active law breakers than smaller companies. There is nothing in the bill which distinguishes between intentional and unintentional conduct, between active and passive participants in the conspiracy, or between long-standing conspirators and new entrants. The bill lays down an inflexible rule -- the company with the largest market share always pays the most. This rule is justified by the bill's proponents as an expression of concern for small and medium-sized businesses. However, it ignores the possibility that the largest, richest defendant may not have the largest share of the market.

The scenario painted by the bill's proponents is that massive antitrust litigation is always characterized by large culpable defendants negotiating "sweetheart settlements," while leaving small and middle-sized businesses, who are usually wrongly accused, holding the bag for the total damages attributable to the entire conspiracy. To remedy this situation, the bill proposes that defendants each be liable only for the overcharges attributable to their own sales. "Sweetheart settlements" with the "largest and most guilty price-fixers" would be discouraged by forcing plaintiffs to reduce their recovery against all other defendants by the total actual damages damages multiplied by the percent of the settling defendant's market share (or the amount actually paid in settlement, if that were greater).

As noted by Senators Metzenbaum and Kennedy in the supplemental views to this Committee's report on S. 1468, small businesses have not rushed to claim this Congressional gift. In fact, small businesses do not perceive the provisions of this bill as a benefit at all. If the lack of a contribution rule makes small and middle sized defendants hostage to plaintiffs' whims, the provisions of S. 995 will make them hostage to larger co-defendants, which is apparently feared with greater trepidation. River Cement Company, the first defendant to settle in the In Re Cement and Concrete Antitrust Litigation, MDL 296 (District of Arizona), in which I am one of Plaintiffs' Co-Lead Counsel, has filed an *amicus* brief in the Texas Industries case, stating the position of small defendants regarding the effect of a contribution rule on their ability to independently conduct litigation. River stated:

> As a small antitrust defendant . . . River wishes to add its voice to the chours [being raised in support of contribution] by emphasizing that unless the impact of the decision in this case upon the antitrust settlement process is considered, there is a risk that havoc may be wreaked upon that process. Much has been said by *amici* supporting petitioners about the coercive effects which a no contribution rule has on defendants who do not wish to settle. River's experience suggests, however, that the threat of contribution can be a device used by large corporate defendants to maximize their own bargaining position at the expense of smaller defendants - which do not have comparable resources to bear the burden of defending against a class action antitrust suit - by keeping them from breaking ranks and settling out early.

In fact, these small companies are the defendants who most frequently start the settlement process.

The idea that any lawyer would engage in a sweetheart settlement with a large culpable defendant while forcing small innocent defendants to trial is ludicrous. It presumes that a lawyer would forego trying a defendant against whom he has good evidence for the opportunity of trying a defendant against whom he has little or no evidence. It also presumes that a lawyer would elect to try a case against a defendant from whom he could not hope to satisfy his judgment, rather than go to trial against a wealthy defendant who would be able to pay. That has certainly not been my experience, and I dare say that such a person would not long maintain a position of leadership among plaintiff's counsel in the class action litigation to which this bill is largely directed.

Much has been said in the testimony before this Committee regarding both this bill, and its predecessor, S. 1468, about the practicable complexities and complications which a contribution rule is likely to impose upon the litigation and settlement of antitrust actions. I will not repeat them again. However, I would like to make two comments in that regard.

First, I do not believe that any of the proponents of this legislation have adequately addressed the practical considerations of this bill. Their answer is that the broad discretion of the trial judge is sufficient to deal with any complications or complexities which a contribution rule might engender. This view is not shared by the numerous trial judges who have discussed the scope of their discretion, and the procedures open to them in the management of complex litigation.

Second, proponents of the bill argue that even if a contribution rule may materially add to the complexity of price-fixing litigation, that is not sufficient reason to permit an unjust situation to continue. Unfortunately, fairness, regardless of cost or complexity, is not always the law of this land. The Supreme Court in State of Illinois v. Illinois Brick, 431 U.S. 720 (1977), recognized that valid claims of injury by truly innocent parties could be sacrificed in the interest of saving judicial cost, complexities and uncertainties. Surely such a rule has equal application to claims between parties who have been found guilty of actions so inimicable to our society that they consititute criminal felonies.

In the situation of multi-district litigation, the complexities engendered by a contribution rule would be even greater. Title 28 U.S.C. Section 1407 authorizes the Panel on Multidistrict Litigation to transfer actions to a single forum only for consolidated and coordinated pretrial proceedings (except in parens patria actions). This means that cases which are transferred back to their forums of origin for trial at the end of pretrial proceedings will produce multiple adjudications of defendants' contribution claims. Should this committee report favorably on any contribution legislation, I urge you to include in that bill a provision amending Section 1407 to allow cases transferred by the Judicial Panel to remain in the transferree forum for trial. This was provided in S. 300 (96th Congress), which was primarily addressed to the overruling of Illinois Brick. Section 3 of S. 300 would have amended Section 1407(h) by expanding the provision for trial in the transferee court from parens patria actions to all Clayton Act cases. Although S. 300 was extremely controversial as it related to the rights of indirect purchasers, there was universal agreement that trial of multiple actions arising from the same facts would be most effeciently and expeditiously conducted in a single forum.

In summary, it is my belief that there is no place in the antitrust laws for the concept of contribution. If contribution is appropriate at all, it is appropriate only in situations where a defendant might be convicted of an antitrust violation which truly involved unintentional conduct. Accordingly, should this Committee feel as a matter of policy that contribution should be available in antitrust litigation, I urge that the implementation of this policy be left to the courts. Rather than shackle the judiciary to the rigid provisions of this bill, I suggest that Congress make a policy statement directing courts to allow contribution as they might determine in appropriate situations. This would allow courts the flexibility to let contribution rules evolve case by case, which is the unique advantage of the common law.

Thank you for your time and consideration.

THE ANTITRUST EQUAL ENFORCEMENT ACT

MONDAY, DECEMBER 7, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 10:15 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Steve Cannon, antitrust counsel; Peter Chumbris, antitrust counsel; Marcy Tiffany, antitrust economist and counsel, John Nash, Senator Laxalt's office; Ally Milder, Senator Grassley's office; Bert Milling, Senator Denton's office; Bert Wides, Senator Kennedy's office; and Art Briskman, Senator Heflin's office.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The hearing will come to order.

Today the committee continues its hearing on S. 995, the Antitrust Equal Enforcement Act of 1981. If enacted, this bill would establish a right of contribution between and among antitrust coconspirators and provide a system of claim reduction, all for the purpose of assuring the fair apportionment of antitrust damages.

I would note that since the committee last heard testimony on this bill the Supreme Court, in the case of *Texas Industries* v. *Radcliff Materials,* ruled that there existed no right of contribution in Federal antitrust cases and, in essence, referred the matter to Congress.

In April of this year the committee received testimony from the Hon. William F. Baxter, Assistant Attorney General in charge of the Antitrust Division at the Justice Department. While Professor Baxter generally endorsed the principles of contribution and claim reduction, he nevertheless requested an opportunity to examine S. 995 in greater detail and then come back to the committee with recommended changes. Professor Baxter has lived up to his word, recently submitting proposed changes to the bill.

The purpose of this hearing today is to examine the efforts of the Division to improve S. 995. Perhaps the most significant change the Division recommends is expansion of the bill to cover all antitrust violations rather than horizontal price-fixing cases only.

Other significant features of the suggested amendment include a time limitation within which contribution actions must be brought and a provision whereby the court in most cases, rather than a jury, decides contribution claims.

Professor Baxter, on behalf of the committee I wish to thank you for your efforts on this legislation and look forward to your testimony today. You may proceed.

STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. **Baxter**. Thank you very much, Mr. Chairman. It is a pleasure for me to be here today and continue our dialog on this problem.

As you have already indicated, we have reworked the statute. We informally submitted a draft to the committee on October 21 and we have now made some rather minor refinements to that draft which we have submitted today.

I have prepared a somewhat longer statement, which I understand will be included in the record this morning. I will touch only quite briefly on the major features of the most recent submission.

As you have already noted, Mr. Chairman, the basic difference between S. 995 and our proposed version is the fact that S. 995 limits contribution to price-fixing cases. In doing so, it seems to me to leave uncovered several categories of cases that are at least, if not more, deserving of coverage as price-fixing cases.

There are, first of all, other cartel-type activities—market divisions and bid rigging situations—which are so nearly like price fixing in their economic effects that it does seem to me difficult to defend treating them differently.

Furthermore, there is the whole category of rule of reason cases where, to the extent the argument for contribution is an equitable argument, it seems to me the argument for coverage is even stronger than in price-fixing or other cartel cases.

Accordingly, we have proposed extending the right of contribution to persons jointly held liable for damages under section 4, 4(a), or 4(c) of the Clayton Act.

Subsection (b) of our statute closely parallels the language of S.995, so that the claim for contribution can be made by cross-claim, counterclaim, or third-party claim in the antitrust case in chief or, alternatively, in a separate action for contribution. And we also make clear that it is not necessary that a person against whom a claim for contribution is made need have been subject to a prior action or adjudication of liability. That can be done in the proceeding that results from the contribution claim itself.

Subsection (c) of our draft introduces a very short statute of limitations. We essentially require that claims of the type under consideration be filed within 6 months after entry of the final judgment in the case with respect to which contribution is claimed. That is a short period of limitations, but it seems to us entirely appropriate in this context.

Subsection (d) makes clear that there can neither be a claim for contribution against a person who has entered into a good-faith settlement with an antitrust plaintiff nor a claim for contribution by a defendant who has entered into such a settlement. Taken together, these two provisions preserve the integrity of the settlement process, continue to treat it entirely as a private matter, and eliminate certain gaming incentives that we think might otherwise be present in the absence of such a provision.

In the draft we submitted to you on October 21, we had a provision which required that a person who entered a settlement advise the court and all other persons party to the action within 60 days that he had entered into a settlement. On thinking about that further, it seemed clear to us that there would be occasions when it was very difficult for a settling party to know of all possible subsequent actions that might be filed with respect to which such notice might be required. It seemed to us that the parties to those subsequent actions were in a perfectly adequate position through discovery, pretrail or indeed at trial, to ascertain the fact that such settlements had occurred and that it was more appropriate to place the burden there. Accordingly, in our most recent draft we have dropped that provision.

The claim reduction provision in our subsection (e) is basically the same in concept as that contained in S. 995. There may be questions about it, but I will not go into it further at this time.

Subsection (f) of the Department's draft contains several important concepts. First of all, it provides that contribution and claim reduction rights are to be decided after the conclusion of the antitrust case in chief, to the extent that is consistent with fair and expeditious conduct of the litigation. We think this is desirable in order to minimize the extent to which adjudication of contribution issues will complicate the prosecution of the underlying antitrust case.

Undoubtedly there will be some cases in which it will be expeditious and equitable to make these determinations as a part of the case in chief. We do not preclude that, but our section plainly represents an attempt to push the court in the direction of subsequent determinations, at least in the preponderance of cases.

Subsection (f) also defines and provides the method to be used in calculating contribution shares. Insofar as claims pertaining to price fixing are concerned, we articulate a standard that depends upon the relative magnitude of the sales or the purchases of the price-fixed goods or services in the market affected by the violation. This formula is similar to the one provided in S. 995.

With respect to all other types of claims—and here, of course, there are included the other cartel-type cases as well as the rule of reason cases—we explored a large number of fairly objective criteria. You may recall it was my hope that we could find objective criteria which would be appropriate devices for allocating damages in these cases.

Without giving you the long list of factors that we explored and experimented with, I have to say that we were unable to come up with any one, two or even three objective approaches that we were able to make work well over the entire range of cases, and consequently, we have fallen back to a fairly general standard.

Essentially, our provision gives judges the flexibility to determine contribution shares by examining the relative responsibility of the involved parties for originating the offending scheme and also to look to the relative benefits obtained from the violation. That, of course, gives the court two different criteria to combine in some way. We do not tell them how to weigh one as opposed to the other. Therefore, we are leaving a substantial amount of discretion in the hands of the courts but, for want of an objective criterion, we think that is the appropriate thing to do.

Subsection (g) of the Department's initial suggestion also has been changed. In the form submitted on October 21, subsection (g) would have directed the courts to determine contribution and claim reduction rights without a jury in every instance. We believed—and I continue to believe—that such a provision was appropriate, that claims for contribution were equitable claims, not claims at law to the extent that contribution was available at common law. It is clear to me that the types of issues that will have to be decided in these matters would be decided better more expeditiously, and at considerably lower cost by judges.

Even in that draft we realized that this proposal raised possible seventh amendment problems, and, accordingly, we included a severability clause intended to protect the rest of the statute in the event that a court found that jury trials were constitutionally required. We have continued to work at the constitutional problem since the submission of that draft. We have, unfortunately, not been able to reach a firm conclusion that the approach is safe from seventh amendment problems. Accordingly, we have now taken a slightly different tack, not wanting to introduce a new and potentially controversial issue that might impede passage of the legislation.

The present draft requires courts to decide contribution and claim reduction rights without juries, unless to do so would be inconsistent with the just and expeditious conduct of litigation. That standard, we think, will encourage the courts to make those determinations without juries whenever they are able to determine that to do so would not raise significant constitutional problems, but it gives them an out wherever serious constitutional problems are thought to exist.

Having taken that approach, we have removed the severability clause from the draft. In our view, it is no longer necessary.

Subsection (h) merely emphasizes that we do not intend anything in the legislation to change the traditional rule that antitrust violations give rise to joint and several liability.

Finally, our amendment is silent on the desirability or the specifics of an applicability clause. The Department will take no position on that issue.

Mr. Chairman, we are not unalterably wed to every word of the proposal we have submitted to you. We do think it is workable in practice and represents an improvement on the existing state of the law.

We look forward to continuing to work with your committee on this legislation, would be delighted to hear any comments that your exceedingly able staff has on it, and hope that we will be able to be of further assistance to you.

That concludes my prepared statement, Mr. Chairman. I would be happy to respond to questions if the committee has any.

The CHAIRMAN. Thank you, Professor Baxter.

Professor Baxter, after studying the current bill and your proposed changes, I believe I understand where we are in agreement and where we may differ at this point.

As I mentioned in my opening statement, the most significant change you propose is expansion of the bill to cover all antitrust violations. I agree with you that there are logical reasons to expand the scope of the bill. However, I am concerned about the effect this expansion may have on settlement, for example.

It seems to me that, although relative market shares in horizontal price-fixing cases may be calculated without too much difficulty, determining each coconspirator's relative responsibility for other types of violations and the benefits derived from them would be a very complex task.

Consequently, I am wondering how accurately plaintiffs could predict the amount they would be releasing by settling with a particular defendant on the claim reduction process set forth in the bill. Would you please comment on that?

Mr. BAXTER. The magnitude of claim reduction that will result from settlement of those cases will indeed be uncertain. I would expect, however, that within a relatively short time a body of caselaw will build up around this provision which will afford guidance and reduce the level of uncertainty.

Nevertheless, I think it is fair to say that it will be harder to settle those cases with the first or second of the defendants than it has been heretofore. It will be no harder to settle the case as a whole, I think, than it was before, but partial settlements will be more difficult. That is in part to be regretted but in part, I think, not to be regretted.

One of the things that must be kept in mind is that the effect on the nonsettling parties was simply to shift to them all the uncertainty that was resolved as between the plaintiff and the settling defendant, so that the amount of uncertainty present in the case is not changed by this provision.

Accordingly, I am not certain that I really regret such efforts in these partial settlements, some of which were quite unfair in the sense that they were simply heaped upon the remaining defendants. These are not settlements that I am necessarily anxious to see.

On the other hand, one might ask whether, given the workload of the courts, we wish to accept that outcome, assuming I have described it more or less correctly. In that context, I would simply urge the committee to consider the following:

Although partial settlements in the cases that are filed, I think, will be made somewhat more difficult by this legislation, I also think that the presence of the contribution right and the resistance that it will generate to the whipsaw settlement technique in multiple defendant cases will significantly reduce the number of spurious antitrust cases that are brought.

I do not think that in any aggregate sense the legislation will increase the workloads of the courts. On the contrary, I think that when these two opposing factors are taken into account, it is far more likely to reduce the workload of the courts.

Nevertheless, I do not think anybody could responsibly deny that partial settlements in these nonprice-fixing cases, and perhaps to some extent in the price-fixing cases as well, will be made more difficult.

The CHAIRMAN. Professor Baxter, I would think that one of the principal reasons for a defendant to settle an antitrust claim is to avoid the expense and burden of further litigation. Do you think that this objective of buying peace would be undermined by the expectation of the settling defendant that he would be brought into a post-trial proceeding in which the relative responsibility of each party and the benefits derived by each party would be litigated?

Mr. BAXTER. The plaintiff will be made more reluctant to settle by that consideration, it is quite true. As I said a moment ago, I think that partial settlements in these cases will be made somewhat more difficult—in the price-fixing cases as in well as the non-price-fixing cases.

But the kind of settlement in which interference will be at its greatest is the dynamic whipsaw financing kind of settlement, whereby the first defendant gets out for half a cent on the dollar and the next one for 1 cent on the dollar and the last one winds up facing an enormous potential liability because he essentially is in a position of having to respond to potential liability for the entire industry. As I said, if those cases are made somewhat more difficult to settle, I am not at all sure that should be grieved.

The CHAIRMAN. Professor Baxter, even though the actual determination of contribution shares would be assigned in most cases to a post-trial proceeding, it seems reasonable to predict that pretrial and trial proceedings would be more complex, because parties would see themselves as actual or potential adversaries.

Do you think that under the relative responsibility and benefit test there would be greater division among defendants simply because each defendant will want to make the best record diminishing his responsibility in comparison with the responsibility of codefendants?

Mr. BAXTER. I am not certain that I really heard the question. I understand the problem, but I want to be sure that I answer the specific question you asked, Mr. Chairman.

The CHAIRMAN. Would you like me to repeat the question?

Mr. BAXTER. All right.

The CHAIRMAN. Do you think that under the relative responsibility and benefit test there would be greater division among defendants——

Mr. BAXTER. OK, that was the word I missed.

The CHAIRMAN [continuing]. Simply because each defendant will want to make the best record diminishing his responsibility in comparison with the responsibility of codefendants?

Mr. BAXTER. Yes, I think there will be a tendency for that to happen, and that is one of the reasons I think it is desirable that, to the extent it is feasible to do so, this contribution question be dealt with in a separate subsequent proceeding. There will be a tendency to complicate the initial underlying antitrust case to the extent these determinations are made in that case.

The CHAIRMAN. Now, Professor Baxter, let us turn for a few minutes to the specific language of your proposal. I am wondering what difference, if any, there is between relative responsibility used in section 4(f) and the relative fault concept used in tort law.

Mr. BAXTER. We do not stop with the word "responsibility." We talk about relative responsibility for the origination or perpetration of the violation. That seems to me more specific. If it indeed merely said "relative responsibility," I would not think that differed very substantially from the concept of relative fault in a more general way.

Our effort here was to direct the court's attention to two fairly specific inquiries. To use the word "specific" in this context is perhaps overdoing it, but we do hope that the courts will focus on which of the defendants really proposed and brought this arrangement into being, a fairly specific historical inquiry, and to what extent each of them really benefited from it.

To be sure, those are neither easy nor objective inquiries. On the other hand, I do not think they can be characterized with as much vagueness as can the phrase "relative fault."

The CHAIRMAN. It seems to me that "relative benefit" is a broad term and could incorporate many factors, such as profits, increased sales, strengthening of market position, and various other competitive advantages. At the very least, it goes beyond the market share concept embodied in S. 995.

What factors were you contemplating that could be utilized by a court in determining relative benefit? Second, do you feel it would be beneficial to define "relative benefit" more precisely?

Mr. BAXTER. I certainly would not resist in principle an effort to define "relative benefit" more precisely. Certainly, I had in mind primarily profitability, the expected profit stream from the arrangement or behavior that constituted the violation.

Once one gets past the classic horizontal price-fixing case, where everyone continues to participate in the market but all do so at a prearranged price, one simply must shift to some division of responsibility other than a market share division, because that is the only context in which a market share approach works at all well. Thus, the cost of dealing with some other criterion is an inescapable cost of broadening "contribution" beyond the price-fixing cases, and the price-fixing cases do seem to me an arbitrarily narrow category of antitrust violations and a rather perverse category of antitrust violations in which to afford the contribution right.

My reaction, as yours seems to be, was that it would be better if we could find a relatively objective criterion to be used in this context, but our imaginations were simply not adequate to that task. We would be receptive to any suggestions the committee might have in that regard, but we were unable to come up with an acceptable objective criterion. This one, accordingly, has a great deal of generality to it, but again I would say not quite so general as the generalized fault concept of tort law.

The CHAIRMAN. I have an urgent call. I am going to have to recess for 3 or 4 minutes.

[Brief recess taken.]

The CHAIRMAN. Professor Baxter, it is somewhat unclear to me how the courts would apply the dual determinations of responsibility and benefit. I wonder if it would be necessary to utilize both.

For instance, would it be reasonable to assume that a party's relative benefit from an illegal practice is likely to approximate its responsibility for it, thus eliminating the need for this dual inquiry?

Mr. BAXTER. I think in a large fraction of cases that is likely to be the case—that the two will be quite closely related. Indeed, if there were only one standard—if, for example, there were only responsibility for origination—and if I were the judge, I would want to take a look at who benefited, simply because I would think that that would be highly probative as to who originated the conspiracy?

I am not certain that the scope of the inquiry that would be appropriate or that would usually be invoked would change if one a single one of those standards rather than using them jointly. I really do think that each inquiry is related to the other.

The **Chairman**. Professor Baxter, I notice that you have retained a separate formula of contribution and claim reduction in horizontal price-fixing cases. In practice, how would you anticipate your relative magnitude of sales of services standard to differ from that set forth in S. 995 as it now stands?

Mr. **Baxter**. I am afraid I do not recall with sufficient precision exactly the wording difference that is involved there in order to give you an answer, Mr. Chairman.

The **Chairman**. On page 2 of your bill, the first line, it says, "according to the damages attributable to each such person's sales or purchase of goods or services."

Mr. **Baxter**. I remember the wording we used. I am trying to remember the wording in S. 995.

The **Chairman**. I was reading from the bill 995.

Mr. **Baxter**. Yes—"each person's sales or purchases of goods or services, the damage attributable to." That suggests that the amount of damage attributable to a dollar's worth of sales may be different for one defendant's sales than for another defendant's sales. It suggests, or some judge might suppose, that if defendant No. 1 had a cost of 90 cents and the price had been illegally fixed at a dollar, and some other defendant had a cost of 95 cents, that less damage was attributable to one's sales than the other's.

That, in my view, is simply mistaken. It is impossible in most cases to know what the competitive price would have been with any precision. It seems to me that a party's responsibility is really best estimated by the extent of his participation in the market—that is to say, by the number of units or the number of dollars' worth of sales that he makes.

If, for example, a price is fixed at $1 and there are other sellers in the market who are not members of a conspiracy but, nevertheless, take advantage of the fact that most sellers, pursuant to the conspiracy, are selling for $1, and they raise their own price under the cartel umbrella to 99 cents, it seems to me that the conspirators are responsible for those sales as well.

To the extent that the language in S.995 suggests otherwise, again, I wish to avoid that. In our bill, it merely says you take all the damages for which these parties are responsible and you distribute them across the set of defendants in proportion to their sales. That does seem to me the correct approach.

The **Chairman**. Thank you very much, Professor Baxter. We appreciate your presence here, and we appreciate the contribution you have made to this hearing.

Mr. **Baxter**. Thank you very much, Mr. Chairman.

The **Chairman**. You are now excused, if you wish to leave.

[Material follows:]

PREPARED STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Mr. Chairman and members of the Committee: I am pleased to be here today to continue the dialogue on contribution in antitrust begun by the Committee earlier this year. When I testified before the Committee in April concerning S. 995 and contribution in antitrust litigation, I was not prepared to endorse specific contribution legislation, but stated that I would continue to work with the Committee in developing an equitable, cost-effective bill. In furtherance of that objective, on October 21 I submitted to the Committee informally a draft contribution statute. We have made some minor refinements in that draft, which is attached and offered formally on behalf of the Department of Justice as an amendment to S. 995. I would like to discuss briefly the major provisions of our draft, after which I will be glad to try to answer any questions the Committee may have.

Our proposed amendment contains many of the basic provisions of S. 995; it also incorporates several new concepts. The most obvious difference between S. 995 and the Department's proposed amendment is that S. 995 limits contribution to price-fixing cases while the Department's amendment would provide rights of contribution in all antitrust litigation. I noted in my earlier contribution testimony that a stronger argument could be made on fairness grounds for permitting contribution among defendants in rule of reason cases than for doing so in cases involving classic cartel-type violations such as horizontal price fixing. The difficulty has been in weighing the costs that broadening contribution legislation would generate against the added benefits that such a broadening would bring to antitrust defendants. I believe that fairness tips the balance in favor of providing rights of contribution in all antitrust cases. Therefore, subsection (a) of the Department's amendment provides contribution rights to any person jointly liable for damages under Section 4, 4A, or 4C of the Clayton Act.

With only slight alterations in language, subsection (b) of the Department's amendment parallels S. 995. It provides that contribution claims may be raised in the antitrust action-in-chief by way of cross-claim, counterclaim, or third-party claim, or in a separate action for contribution. This is intended to provide maximum procedural flexibility in raising contribution claims. The subsection also makes clear that it is unnecessary for there to have been a prior action for, or adjudication of, joint liability for antitrust damages against a person before a claim for contribution may be asserted against that person; such liability may be determined in the separate action for contribution.

I would like to stress with respect to subsection (b) that, while we have attempted to provide maximum flexibility in raising contribution claims, it is not our intention to affect in any way underlying substantive law concerning liability for antitrust damages. The determination of whether there is joint liability for antitrust damages should turn on the careful application of antitrust theory to the particular facts of each case, and should not be affected by the availability of contribution. Creating a new cause of action for contribution will in all probability generate additional litigation concerning issues of joint liability, but such litigation should not be affected in any way by the presence or absence of rights of contribution.

Subsection (c) of the Department's amendment contains a statute of limitations provision. In an area as complex as contribution, I believe that it is appropriate to place some limitation on the time during which actions for contribution can be brought. We have drafted a subsection that provides a six-month limit after entry of final judgment in the underlying antitrust action-in-chief for filing claims for contribution. We believe that such a limit would provide ample time for those persons jointly liable for damages by reason of such judgment to file actions for contribution, and at the same time promote the expeditious filing of contribution claims.

Subsection (d), like S. 995, prohibits claims for contribution against persons who have entered into good faith settlements with antitrust plaintiffs. Contribution should not discourage reasonable settlements. If those who wished to settle on fair terms with an antitrust plaintiff would face claims for contribution and potentially binding determinations of liability in contribution litigation, they would probably decline to settle on any terms, regardless of the good faith of all involved. Prohibiting claims for contribution against settled persons will eliminate this disincentive.

Subsection (d) also prohibits claims for contribution by persons entering into settlements. Without this provision, it is possible that a person who entered into an unwise settlement could attempt to make other defendants share that burden through an action for contribution. The provision in the Department's amendment prohibiting such suits recognizes that settlement is a voluntary act, the consequences of which should be confined to the parties to the settlement.

The informal draft I submitted to the Committee on October 21 also provided that in order for settling persons to avail themselves of the protection from suits for contribution provided by subsection (d), they would be required to advise the court and all other persons party to an action upon which contribution claims could be based of the existence of their settlement agreement within 60 days of settlement or of the commencement of the action, whichever was later. The purpose of this provision was to apprise the defendants in an antitrust action of the existence of settlement agreements entered into between the plaintiff and others, particularly nonparties to the action. This information could be useful for claim reduction purposes. In thinking further about how this notice requirement would work in practice, however, we recognized that it could be difficult for persons released in settlement to be aware of all potential antitrust suits that might result in their potential liability for contribution, including particularly actions filed after a settlement. We think there is probably a good substitute for notice to defendants by persons released in settlements. Parties to antitrust actions have the ability, through pretrial discovery and at trial, to determine the existence of settlements entered into by the plaintiff that could affect their claim reduction and contribution rights, and we believe that the burden of uncovering this information could appropriately rest with them. Therefore, the notice provision has been deleted from our current amendment.

The Department's claim reduction provision, contained in subsection (e), is identical in concept to S. 995. A plaintiff entering into a partial settlement of its antitrust claim will have that claim reduced by the greatest of (1) any amount stipulated for this purpose, (2) the amount of the consideration paid for the settlement, or (3) the settling person's "contribution share." Under current law, only the amount of the consideration actually paid for the settlement is deducted from the plaintiff's claim to prevent the possibility of double recovery. This can lead to a situation where defendants that have not yet settled face steadily increasing potential damage liability and pressure to settle. If plaintiffs' claims are reduced by settling persons' "contribution shares," nonsettling defendants are not made worse off by reason of favorable settlement terms negotiated between plaintiffs and settling defendants, and the pressure to settle does not increase.

Subsection (f) of the Department's amendment contains several important concepts. First, the subsection provides that contribution and claim reduction rights are to be decided after the conclusion of the antitrust action-in-chief, to the extent consistent with the fair and expeditious conduct of litigation.

Some contribution issues, such as liability in cross-claim and counterclaim contexts, and perhaps in some unusual instances of third-party claims as well, might expeditiously be resolved in the action-in-chief. In general, however, determining contribution and claim reduction rights afterwards should minimize interference with the underlying antitrust action.

Subsection (f) also defines, and provides the methods to be used in calculating, contribution shares. Regarding claims limited to price fixing among competitors, a specific contribution formula is provided whereby contribution shares are to be calculated on the basis of the relative magnitude of sales or purchases of the price-fixed goods or services in the market affected by the violation. This formula is similar to the one provided in S. 995. With respect to all other types of claims, we believe that there is no one "best" contribution formula to apply, and so the Department's amendment provides flexibility to judges to determine contribution shares by examining the relative responsibility of the involved parties for originating or carrying out the violation as well as the relative benefits obtained from the violation. I believe that this flexibility would help courts to achieve the fundamental fairness goal of contribution in cases other than those involving horizontal price fixing.

Subsection (g) of the Department's amendment has been changed slightly since my October 21 submission to the Committee. In its original form, subsection (g) would have directed courts to determine contribution and claim reduction rights without a jury in every instance. We believed that such a provision was appropriate because the types of issues that would have to be decided in contribution litigation could best be decided by judges, and because it would streamline contribution litigation and help to minimize costs. Because we realized that that proposal raised possible Seventh Amendment problems, we included a severability clause to protect the rest of the statute in the event that a court found that jury trials were constitutionally required to decide certain contribution or claim reduction rights.

Since the submission of our original draft, we have made additional efforts to satisfy ourselves on the constitutionality of eliminating jury trials for contribution issues. Unfortunately, we have not been able to reach a firm conclusion. Considering the complexity of the contribution issue standing alone, and not wanting to introduce a new and potentially controversial issue that might impede passage of the legislation, we have redrafted subsection (g) to require courts to decide contribution and claim reduction rights without juries unless to do so would be inconsistent with the just and expeditious conduct of litigation. In essence, we would like courts to decide contribution and claim reduction rights without juries to the fullest extent possible consistent with the Seventh Amendment and the expeditious conduct of litigation. I still firmly believe that contribution issues are equitable in nature and are best decided by judges alone and that minimizing the use of juries will help hold down the complexity and cost of contribution litigation. Because redrafted subsection (g) no longer presents a possible conflict with the Seventh Amendment, the severability clause (which was subsection (j)) has been eliminated from our current amendment.

Subsection (h) is merely intended to make clear that nothing in our amendment alters the traditional rule that antitrust violators are jointly and severally liable for damages caused by their violations. There is a similar provision in S. 995.

Finally, our amendment is silent on the desirability or specifics of an applicability clause. The Department will take no position on this question.

While we are not unalterably wedded to all of the specifics of our amendment, I think it would be workable in practice and that it would satisfactorily address the major issues presented by the introduction of contribution into antitrust litigation. I hope that it will be of assistance to the Committee in its consideration of contribution legislation, and I am prepared to offer the Committee whatever assistance I can in its further deliberations on this matter.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions the Committee may have.

Draft Contribution Amendment

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Any person who is liable for damages in an action brought under section 4, 4A, or 4C of this Act may claim contribution, in accordance with this section, from any other person jointly liable for such damages.

"(b) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

"(c) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

"(d) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

"(e) In any action under section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of: (1) any amount stipulated for this purpose, (2) the amount of the consideration paid for the release, or (3) the contribution share of the person released.

"(f) Contribution and claim reduction rights shall, to the extent consistent with the fair and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which contribution or claim reduction rights are claimed. With respect to claims based upon price fixing among competitors, contribution shares shall be determined on the basis of the relative magnitude in the affected market of each such competitor's sales or purchases of goods or services subject to the violation. In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each party for the origination or perpetration of the violation for which damages have been awarded and the benefits derived therefrom.

"(g) Unless inconsistent with the just and expeditious conduct of litigation, contribution and claim reduction rights shall be determined by the court sitting without a jury.

"(h) Nothing in this section shall affect the joint and several liability of any person.

"(i) [Applicability provision, if any.]"

Draft Contribution Amendment
Section-by-Section Analysis

(a) Subsection (a) provides that there shall be rights of contribution among persons jointly liable for damages arising under the antitrust laws. This reverses the decision of the

Supreme Court in Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981), denying contribution in antitrust damage actions.

(b) Subsection (b) provides that contribution claims may be raised in the antitrust action-in-chief or in a separate action for contribution. Within the action-in-chief, claims for contribution may be raised by way of cross-claim, counterclaim, or third-party claim. This is intended to give the parties procedural flexibility in raising contribution issues. Contribution claims by defendants against nonparties to the underlying antitrust action also may be raised in a separate action for contribution. There is no intention to affect in any way the underlying substantive law concerning liability for antitrust damages. The subsection also provides that it is not necessary that there be a prior action for, or adjudication of, joint liability for antitrust damages against a person before a claim for contribution may be asserted against that person. Such liability may be determined in the action for contribution.

(c) Subsection (c) provides a six-month statute of limitations for contribution claims, measured from the date on which the antitrust judgment for which contribution is sought becomes final. This will provide ample time for those persons jointly liable for damages by reason of such judgment to file separate actions for contribution, and at the same time assure that all contribution claims will be filed expeditiously.

(d) Subsection (d) provides that persons who have entered into good faith settlements with the plaintiff may neither sue nor be sued for contribution. Prohibiting claims for contribution against settled persons will encourage settlements by guaranteeing that persons receiving settlements will be able to avoid binding determinations of liability and additional claims for damages once they have entered into a good faith settlement. Prohibiting suits for contribution by settled persons recognizes that settlement is a voluntary act, the consequences of which should affect none but the settling parties. A person who enters into an unwise settlement should not be able to shift the burden of that settlement to others, and this subsection therefore denies persons who settle the right to seek contribution based on such settlements.

(e) Subsection (e) provides for claim reduction in antitrust damage actions brought pursuant to Clayton Act Section 4, 4A, or 4C. When a plaintiff settles with a defendant in an antitrust action under current law, only the amount of the settlement is deducted from the plaintiff's claims against remaining defendants to avoid double recoveries. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). This would be changed to provide that a settlement reduces the plaintiff's remaining claims by the greatest of any amount stipulated for this purpose, the amount of the settlement, or the settling person's contribution share. This will insure that nonsettling defendants are not made worse off by reason of favorable settlement terms negotiated between the plaintiff and settling persons.

(f) Subsection (f) provides that contribution and claim reduction rights are to be decided after the conclusion of the antitrust case-in-chief, to the extent consistent with the fair and expeditious conduct of litigation. Some contribution issues, such as liability in cross-claim and counterclaim contexts, and perhaps in some unusual instances of third-party claims as well, might be expeditiously resolved in the case-in-chief, but in general, determining contribution and claim reduction rights afterwards should minimize interference with the underlying antitrust action.

This subsection also provides the method to be used in calculating contribution shares. Regarding claims limited to price fixing among competitors, contribution shares are to be calculated on the basis of the relative magnitude of sales or purchases of the price-fixed goods or services in the market affected by the violation. Regarding all other claims, the court shall consider the relative responsibility of the parties for originating or carrying out the violation as well as the parties' relative benefits from the violation.

(g) Subsection (g) provides that contribution and claim reduction rights are to be determined by the court rather than by a jury unless inconsistent with the just and expeditious conduct of litigation. Contribution is an equitable doctrine, and the complex issues required to be determined to afford contribution and claim reduction are best left to the court whenever justice permits. It is also believed that subsection (g) will minimize the judicial resources and time needed to settle contribution and claim reduction claims.

(h) Subsection (h) is intended to make clear that this section does not alter the traditional rule that antitrust violators are jointly and severally liable for the damages caused by their violations.

(i) Subsection (i) would contain an applicability clause if Congress decides that one is desirable. The Department takes no position on the desirability of including an applicability clause or on its specifics if one is included.

The **Chairman**. Our next witness is the Honorable Charles B. Renfrew of Pillsbury, Madison & Sutro, San Francisco, formerly a Federal judge.

Judge, we will be glad to hear from you.

STATEMENT OF CHARLES B. RENFREW, LAW FIRM OF PILLSBURY, MADISON & SUTRO, SAN FRANCISCO, CALIF.

Mr. **Renfrew**. Thank you, Mr. Chairman. I am delighted to be here to share my views with respect to the need for contribution and claim reduction legislation.

As is rather obvious, I do not have a prepared statement. I would like leave of the chairman to submit a statement later based upon the work I have done preparing myself for this hearing.

The **Chairman**. Without objection, your statement will be received. I presume you can get it to us in a couple of weeks?

Mr. **Renfrew**. Yes, sir, I certainly shall.[1]

The **Chairman**. Thank you.

Mr. **Renfrew**. What I would like to do this morning, Mr. Chairman, is three things: First, I would like to review very briefly the history of contribution and the trend permitting contribution, to give some historical perspective for this legislation. Then I would like to address some of the very legitimate and proper concerns which have been expressed about S. 995. Finally, I would like to analyze some of the differences between S. 995 and the very thoughtful proposals that have been made by Assistant Attorney General Baxter this morning in his testimony.

I think we are all aware that the rule against contribution among joint tort-feasors arose in England in the *Merriweather* v. *Nixan* case. It came out of the common law, a very ancient legal maxim that one who had deliberately done wrong should not be able to found an action upon his own tort.

That rule of course dealt with willful or intentional conduct. Within 100 years after the *Merryweather* case almost every jurisdiction in this country adopted the rule against contribution. However, it was not restricted to willful or intentional tort cases—that distinction somehow got lost coming across the Atlantic—and it was made applicable to all tort cases.

I know the chairman served as a judge, and we all know—those of us who have studied the law—that the history of the law is experience, and the experience under the rule prohibiting contribution has been harsh, it has been unjust, and it has been inequitable. This is particularly so since, increasingly, nonintentional conduct and strict liability have become the basis for tort liability.

As a result, in England in 1935 they did away with the *Merryweather* rule and permitted contribution. The Congress saw fit in 1933 to provide in the Securities Act and in 1934 in the Securities Exchange Act to permit contribution among intentional tort-feasors. A majority of American jurisdictions permit contribution.

Under the Federal common law contribution is permitted in admiralty cases, air collision cases, security fraud cases under section 10(b)(5), and in negligence cases on Federal property.

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[1] Prepared statement can be found on page 148.

I think there is a clear, unmistakable trend in the law permitting contribution in such cases. It is done in accordance with the principles of fundamental fairness and in support of the policy that wrongdoers should pay their proportionate share of the damages that they cause.

Interestingly, until recent times, however, there has been no interest in contribution or great concern about contribution in the antitrust field. That has radically changed, and I believe because of a number of factors.

As you all know, through the judicial doctrine of joint and several liability that came in 1906, we then added the treble damages and attorneys' fees in 1914. Fraudulent concealment came in the early 1960's, expanding the period of time for which damages could be claimed. In 1966 we amended rule 23 to permit the opt-out provisions of the new class actions. In 1976 we added parens patriae which permitted State attorneys general to sue on behalf of their respective citizens.

The result of these factors, I believe, has led to the situation where a nonsettling defendant faces the prospect of industrywide liability that simply is crushing and, under these circumstances, as a practical matter may be foreclosed from access to the court and simply be forced to settle.

As the chairman mentioned earlier, we know from this spring that the United States Supreme Court has told us, in *Texas Industries,* we must turn to the Congress and not to the courts for relief to permit contribution among tort-feasors.

The Supreme Court, in the *Cooper Stevedoring* case, in speaking about comparative negligence, said that a more equal distribution of justice can best be achieved by ameliorating the common law rule against contribution, which permits a plaintiff to force one of two wrongdoers to assume the entire loss, even though the other may be equally or more to blame. That is simply the purpose of this legislation, Mr. Chairman.

There have been some, I think, proper, very legitimate, and thoughtful concerns expressed about this legislation: Is it equitable? Does it comport with the doctrines of equity? Does it impede the deterrence of violations? Does it add to the complexity of antitrust cases, or will it interfere with the likelihood of settlement of such cases?

As far as equity is concerned, Mr. Chairman, I think it is fundamental in equity that a wrongdoer should pay his proportionate share of the damage that he caused. There are some who feel that wrongdoers should not be permitted to have access to the courts, and particularly where the wrongdoer is an intentional or willful wrongdoer, that somehow the concept of fairness is not applicable to one who has done wrong.

I think this shows a lack of awareness or sensitivity to the history of this country and particularly to the jurisprudence that has evolved in this republic.

This country, of all civilized countries in the world, has stood for the principle that even the wrongdoer is entitled to fairness. This is the basic underlying principle of due process which we afford to all wrongdoers, even wrongdoers after they have been found guilty of a crime.

To deny contribution, I think it is important to note, would permit wrongdoers to evade responsibility for their wrongful acts. The law permitting contribution simply is going the other way.

But fundamentally I think the concept of intentional activity in the field of antitrust is somewhat misleading. Most antitrust violations are not the result of intentional acts, and this is so even in the case of price fixing. Let me give you an example.

In 1969 the Supreme Court came down with the decision in *United States* v. *Container Corp.* After that case a number of businessmen sought to verify their competitors' prices to customers in order to avoid violating the Robinson-Patman Act. A number of intermediate appellate courts held that to be proper conduct.

However, in 1978 the U.S. Supreme Court in the *United States Gypsum* case said that was unlawful—that was a violation of the law. I think we should never forget what the Supreme Court told us in the *Gypsum* case—that intent is only an essential element in a criminal violation of the antitrust laws, it is not an element for a civil violation.

I invite the attention of the chairman and the staff to 438 U.S. Reports, page 436, note 13. There the Court clearly pointed out that if conduct has an anticompetitive effect it need not have an anticompetitive purpose to violate the antitrust laws.

Another question that has been raised is, is this conduct somehow more likely to be deterred if we deny contribution? People argue that, because of the fact that contribution would cut down the potential liability of a businessman and make it more likely for him to know the precise amount for which he might ultimately be held liable, somehow there would not be this same deterrence.

Mr. Chairman, it seems to me that ignores a number of factors, and one, I think, is the incredible significance of the criminal sanction that we have in antitrust laws.

We all know, until the *Heavy Electrical Equipment* cases in the mid-1960's, there was not much use of the criminal sanction. People very rarely went to prison for violating the antitrust laws. Indeed, at that time it was a misdemeanor. It was not until 1974, when the Congress amended the laws with the Antitrust Procedures and Penalties Act, that it became a felony.

At that time the individual fines were raised from $50,000 to $100,000, imprisonment went from 1 year to 3 years, and the corporate fines went up to $1,000,000.

The period of the 1970's reflects a substantial change in the use of that sanction. In 1972 one person was indicted. By 1978 that went up to 29. The time actually served went from 50 days in 1974 to 2,921 in 1978. And that trend is continuing. In the first half of fiscal year 1981, of the 69 people indicted, 36 have been sent to prison for a total of 3,111 days.

Assistant Attorney General Baxter has said repeatedly that it is his intention to seek criminal sanctions and individual indictments in cases of classic cartel behavior, particularly price fixing.

We also have the deterrent effect of the treble damage action itself. When we are talking about classwide actions, it is very likely that the gain to the violator is to be trebled, attorneys's fees to be awarded, plus his own costs of litigation. That is a substantial deterrent.

The risk analysis theory, that somehow a businessman would be less likely to engage in this activity knowing that he would face potential industrywide liability, puzzles me. It puzzles me because I am unaware that in the real world this is the way that decisions are made—on the pure basis of risk analysis.

I know of no case, I have seen no study, no data, to suggest that a businessman was deterred from illegal conduct because he felt he might be liable for treble industrywide sales rather than his own.

But even if we assume the risk analysis to be a valid method of determining whether there is a deterrent impedence in this legislation, we cannot simply look at one side of risk analysis. We have to look at the risk analysis that a businessman might take: "Yes, if I engage in this activity and settle out early, and get an early buyout, I can do so for a very small amount and be able to keep some of the fruits of my conspiracy, and transfer some of my potential liability to the others who have not settled."

I think also it is important, Mr. Chairman, as the Supreme Court commented in the *United States Gypsum* case, that there can be an overdeterrence, which can prevent procompetitive activity on the part of businessmen to the detriment of the public.

Finally, I wonder what kind of deterrence is served if one who is an intentional wrongdoer escapes without any liability whatsoever.

I would like to turn now to the objections that have been raised about the increased complexity that this legislation would bring about. I think it is entirely proper for this committee to examine what will be the impact upon the courts of this legislation.

Every time we grant a new substantive right, there will be a burden on the court. The issue here is, will it be an undue burden, and will it create unnecessary and impossibly complex issues? Mr. Chairman, I believe not.

The chairman served on the National Commission for the Review of Antitrust Laws and Procedures, and my experience and the conclusion of that Commission has been that in complex litigation, if the trial judge takes early, continuous, and effective control of the case, it can be manageable. Indeed, I think recent experiences have suggested that where there has not been judicial control, the cases become unduly prolonged and protracted.

I think under the Federal rules the trial judge has the necessary tools to deal with the issues of contribution and claim reduction. This was the conclusion that this committee reached in its report on S. 1468, and I agree with it.

Finally, we do not have to just speculate, Mr. Chairman. We can turn to the experience of the courts in the securities fraud cases, which are complex, difficult cases. Contribution has been permitted in those cases for years.

Another issue that has been raised is, what about settlement? Does this legislation foreclose the possibility of settlement in these cases? I think not. The Supreme Court, in the *Reliable Transfer* case, noted that the doctrine of comparative negligence, which is analagous in some ways to contribution, did not have the effect of impairing settlement of those cases. Furthermore, where we have had judgment-sharing agreements, they have not interfered with settlement.

I think there are some settlements that will be less likely to come about. A sweetheart settlement is less likely to come about, because there is less incentive for the plaintiff to let one of the defendants out for a small amount if the potential liability resulting from that defendant's activities are not to be transferred to the remaining defendants, and there is less incentive for the defendants to settle under a coerced or forced basis.

But as the Supreme Court said in *Reliable Transfer,* Mr. Chairman, an unjust substantive rule of law should not be continued simply because it promotes speedy out-of-court settlements.

I would like now to turn to a comparison of some of the provisions of the legislation proposed by General Baxter and contrast them with the provisions of S. 995.

The chairman pointed out, I think, that the fundamental difference is the expansion of the coverage of this legislation to include all antitrust violations. I support that concept, I think it should be done, but I think at the present time we do not have enough facts. I do not think we have enough data before us to establish the need for the coverage in the other types of violations. I do not think that there is a study that shows us the existence of that need, the extent of it, and the problems that have arisen.

In contrast, I think we do have the need demonstrated, clearly demonstrated in the horizontal price-fixing cases. Let me just give you two examples of the extraordinary problems which have come about.

One we know of is the *Plywood* cases. The three nonsettling defendants there face a potential liability of between $1.2 billion and $2 billion. In the *Corrugated Container* case, we know that the single nonsettling defendant there faces a potential liability of three-quarters of a billion dollars, even after the amount paid in settlement by the other defendants, including interest, of $450 million, is taken into account.

But those are not the only examples. We have undertaken a study of three districts—the northern district of California, the southern district of New York, and the northern district of Illinois—and in nine other cases. That study indicates that there are 268 companies involved in antitrust cases in which there are price-fixing claims.

In addition, there are some 59 districts which the Administrative Office of the U.S. Courts has indicated have 10 or more antitrust cases as of June 1, 1980. In those districts there are 1,654 companies in cases involving price-fixing charges that have this problem.

The problem is of great magnitude; it involves many hundreds of companies. The data which I have given you and which I would like to submit to the committee in the form of an exhibit is preliminary; it is not complete. We are verifying it by telephone confirmation, because a number of the cases involve companies that have been dismissed for one reason or another or have settled out. But I think this exhibit does demonstrate the present need and the extent for this legislation.

So I would urge that the committee study the possible expansion of this legislation to other types of antitrust violations but that it not defer enactment of this legislation, because of the demonstrated need we have today.

I think the method of determining the contribution shares essentially is the same in S. 995 and that proposed by Assistant Attorney General Baxter in his legislation with respect to horizontal price-fixing cases. Of course, he does advocate the use of relative responsibility for other types of cases. From my own personal perspective, I would think that that might be a concept the committee might wish to use in all cases in determining contribution share.

I am well aware that in almost all horizontal price-fixing cases it will be their market shares or their sales of goods and services, but I think the relative responsibility can perhaps give us greater flexibility and in the evolution of the law on a case-by-case basis may achieve a more just result.

I think the 6-month statute of limitations, the cutoff period for claims of contribution, is right and should be included. I think that contribution is an equitable doctrine. I think it is a matter that should be tried to the court and not before the jury and, as Assistant Attorney General Baxter suggested, in a subsequent proceeding, not in the main proceeding.

In summary, Mr. Chairman, I think that, with the single exception I have made, the provisions that have been suggested by Assistant Attorney General Baxter should be included within S. 995 and that it should be enacted as promptly as possible.

There is one further point that was not mentioned. I take no position on it. That is the question of the applicability of this legislation to pending cases. That is an issue that is here. I am not going to address it. It is not before us, as I understand it, at this hearing. That is an issue, however, which must be addressed by this committee and, I think, should be the subject of a very early and prompt hearing.

That concludes my remarks. As I said, we do have this preliminary survey, which I would like to have as an exhibit. As we complete it and put it into final form, I would like to substitute the final exhibit for the earlier one.

The **Chairman**. Judge, thank you very much. We appreciate your appearance here, and I am sure your testimony will be very helpful to the committee.

Mr. **Renfrew**. Thank you, sir.

The **Chairman**. Judge, we are particularly pleased to have you with us this morning for two important reasons. First, your reputation as an antitrust expert is unsurpassed. Second, and perhaps more important to our deliberations this morning, is the fact that you served with great distinction on the Federal bench.

As you well recognize, the burden of administering a system of contribution claim reduction were this bill to pass would be placed squarely on the backs of your former colleagues.

I sincerely hope the Congress will enact this bill into law. At the same time however, I want to be sure that the benefits of any bill that is finally enacted are not heavily outweighed by side effects, such as increased complexity, decreased deterrence, and harm to the settlement process.

As my questions to Professor Baxter indicate, my major concerns over his proposal relate to its effect on settlement and increasing the complexity of already complex antitrust litigation. These concerns of course relate directly to the responsibility of the district court judge to manage the litigation and see it through to its conclusion either by settlement or trial on the merits.

Given your special perspective, which none of the rest of us has, I would be interested in your response to some of the same questions I asked Professor Baxter. Under the test of relative responsibility and derived benefit, do you think that plaintiffs would likely be more cautious about settlements and perhaps insist on larger amounts than they would otherwise consider recoverable?

Mr. **Renfrew**. I think there will be an impact on settlements, Mr. Chairman. I think that the so-called sweetheart settlement—the early settlement—is less likely to come about simply because the plaintiff has less incentive to seek such a settlement, since he will no longer be able to transfer the settling defendant's potential liability to the remaining defendants.

With respect to the other defendants who believe that they have a good-faith defense on the merits, I think they will be less likely to settle and be more willing to try their case, simply because they do not face the prospect of industrywide liability.

But I do not think that that is bad, because I think that in effect we have precluded people from access to the courts, which I think is wrong. On balance, I think that the effect on settlement will not be detrimental. I think there will be settlements. I think the existence of the treble damage remedy and attorney's fees for one's sales and activities still constitutes a powerful incentive to settle cases.

Indeed, in my experience people have settled generally on the basis of the individual single damages in lieu of the prospects of going to trial and the possibility of losing and being responsible for treble damages and the attorney's fees.

The **Chairman**. Judge Renfrew, during its deliberations on this bill, the committee has struggled to resolve the inevitable conflict between its desire to create a system of contribution and claim reduction that is as fair as possible yet simple and straightforward enough to insure that it will operate smoothly.

S. 995 is straightforward with little room for discretion on the part of the court and is limited in its scope. Both the Justice Department and ABA proposals are not so limited. Both proposals give the court great discretion but also promise substantially more complexity than S. 995.

I am wondering if it may be possible to combine the two and set out formulas for the court to follow, unless it would be substantially unjust or unfair to do so. Do you think such an approach is feasible?

Mr. **Renfrew**. I do.

The **Chairman**. Would you care to comment on that?

Mr. **Renfrew**. It seems to me that in almost all cases the formula for assessing contribution shares set forth in S. 995 would be those that would be assessed under the concept of relative responsibility.

Perhaps as a former district judge and thinking of my colleagues, I do not despair of the prospect of giving discretion to the courts to develop on a case-by-case method a system for allocating contribution shares with Congress setting forth the guidelines and standards to be followed, such as market shares, culpability, and what-have-you.

I favor the concept of relative responsibility for assessment of contribution shares in all cases, including horizontal price-fixing cases.

The **Chairman**. Judge, Professor Baxter would prohibit the jury in most cases from determining contribution and claim reduction rights. Do you agree with this approach?

Mr. **Renfrew**. I would phrase it differently, Mr. Chairman. I would not say that we are prohibiting the jury from doing it, because we are dealing with an equitable concept which is not to be tried by the jury.

I think that generally there is not a right to a trial by jury in matters of equity and that in those circumstances the matters are best handled by the court, and they do involve complex and difficult issues. I think it makes sense that we follow the equitable doctrines and let them be decided by the court and not the jury.

I do not think we are taking anything away from the jury. I think this is a doctrine which was never intended to be decided by a jury.

The **Chairman**. Judge, we have a few other questions, but time is moving on. Could we submit to you some other questions and ask you to answer them for the record?

Mr. **Renfrew**. I would be happy to respond in writing, Mr. Chairman.

The **Chairman**. Again, I want to thank you for your presence here and your contribution.

Mr. **Renfrew**. Thank you, Mr. Chairman.

[Prepared statement was subsequently supplied for the record.]

PREPARED STATEMENT OF CHARLES B. RENFREW

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Charles B. Renfrew and I am an attorney with Pillsbury, Madison & Sutro, a San Francisco law firm. I am delighted to appear this morning and have the opportunity to share my views with the Senate Judiciary Committee on antitrust contribution and claim reduction legislation. I speak not only from my experience as an antitrust practitioner but as one who served with the Department of Justice and who also sat for over eight years as a United States District Judge.

I strongly support the principles of this legislation. The rights of contribution and claim reduction (or carve-out) are urgently needed in order to prevent unjust, unfair and inequitable results. The present absence of such rights has created situations in which industry-wide claims are made against litigating defendants based not only upon their activities but upon the cumulative sales of early settling defendants as well. Under these circumstances a defendant that believes it has a valid defense on the merits may have no practical choice but to submit to escalating settlement demands and effectively be denied access to the courts. This permits price fixers to pay token settlements, enjoy the fruits of their conspiracy, and transfer potential liability to their competitors who attempt to defend themselves.

What I would like to do this morning is put the proposed legislation in some historical perspective, address some very proper and legitimate concerns which have been raised about the legislation, and finally, analyze the differences between S.995 and the very thoughtful proposals made by Assistant Attorney General Baxter in his earlier testimony.

The rule against contribution among joint tortfeasors arose at common law based upon the ancient legal maxim that any person who had deliberately done harm could not found an action upon his own tort. The case was the English case of Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng.Rep. 1337, K.B. 1799.* Within one hundred years the rule against contribution was adopted in almost every jurisdiction in this country. However, whereas the rule in England dealt solely with willful or intentional torts, that distinction was lost in this country, and the rule was applied to all torts.

The history of the law has been experience, and the experience under the rule against contribution has been unfair and harsh -- particularly as unintentional conduct and strict liability increasingly became the basis for tort liability -- and the rule has been abrogated both in England and in this country. In 1935

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* See generally Report of the Committee on the Judiciary of the United States Senate on S.1468, S.Rep. No. 96-428, 96th Cong., 1st Sess. at 5-12 (1979) (hereafter "Senate Report"). Attached as Exhibit A is a recent letter in which I have reviewed the federal securities cases permitting contribution between intentional tortfeasors.

England permitted contribution not only with intentional torts but where the tort was a crime. The Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5 c. 30 (1935). A majority of the jurisdictions here by statute permit contribution. In the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress specifically provided for contribution among intentional tortfeasors. Section 11(f) of the Securities Act of 1933, 15 U.S.C. §77k(f); Sections 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§78i(e), 78r(b). The federal common law has created contribution rights in cases in admiralty, air collision, stock fraud, and negligence on federal property.

There has been a clear and unmistakable trend in the law permitting contribution based upon principles of fundamental fairness, and it reflects the policy of allocating damages in an equitable manner upon the responsible parties.

Until recently there was not as much activity in the antitrust field with respect to contribution rights. However, because of the recent coming together of a number of factors, there is presently great concern and interest on this subject. Joint and several liability had been judicially established in 1906. City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906). Congress added treble damages and attorneys' fees in 1914, 15 U.S.C. §15, but with the addition of the judicial doctrine of fraudulent concealment extending the period for which damages may be claimed in 1962;*

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* Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 613 (S.D.N.Y.), aff'd, 312 F.2d 236 (2d Cir. 1962), cert.denied, 373 U.S. 909 (1963).

the opt-out provision of the amended class action rule in 1966, Rule 23, Fed.R.Civ.P.; and the adoption by Congress of parens patriae in 1976 giving the state attorneys general the right to sue on behalf of their respective citizens, 15 U.S.C. §§15c-15h; the possibility was created of massive industry-wide liability for non-settling defendants in antitrust cases. Let me give just two examples.

In the Plywood Antitrust Litigation, M.D.L. 159 (E.D.La.), the three non-settling defendants face potential liability of between 1.2 to 2.0 billion dollars based not only on their sales but also on the sales of the other defendants who settled.

In the Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D.Tex.), the single remaining defendant faces potential liability of $750,000,000 -- even after the deduction of $450,000 in settlements, including interest.

This reflects a dramatic change. In the last several years there have been settlements of approximately 2 billion dollars, more than in all the preceding years of private damage actions under the Clayton Act, and this was without any significant changes in the substantive law affecting the field. See Senate Report, at 11.

Earlier this year the Supreme Court announced in Texas Industries, Inc. v. Radcliff Materials, Inc., et al. ___ U.S. ___, 49 U.S.L.W. 4537 (May 26, 1981), that it is up to the Congress, not the courts, to create the right to contribution. Hence we turn to S.995 which is designed to bring about fairness and justice in the litigation of antitrust damage claims. As the Supreme Court stated in Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (5th Cir. 1974), a case involving comparative negligence, "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame."

This is simply all we are talking about in this legislation.

There have been some concerns expressed about this legislation that are proper and need to be addressed. Is it consistent with basic principles of equity; will it continue to deter violations; will it raise such complex issues that they are not capable of being tried; and finally, will it preclude settlements of antitrust cases?

Turning to these concerns, there is, of course, a basic principle of equity that there should be an allocation of damages among joint tortfeasors according to their respective responsibilities. But opponents to contribution argue that the judicial process should not be made available to assist a wrongdoer, particularly an intentional or willful wrongdoer. They urge that fairness has no place when one deals with an intentional tort which can also be a crime. This argument shows a failure to appreciate American history and the hallmark of our jurisprudence. Due process after all is nothing more than fundamental fairness, and fundamental fairness is offered to all charged with a crime, and even those found guilty of a crime. Due process or fundamental fairness is the bedrock of our legal system.

The thrust of the law has been steadily going the other way permitting contribution. Moreover, refusal to permit contribution may allow a willful and intentional tortfeasor to escape without any liability whatsoever simply because the plaintiff has sued someone else. Most antitrust cases do not involve intentional behavior in the usual sense of the word, but most significantly, even in price-fixing cases there may not have been an intentional violation of the law. For example, following the 1969 case of United States v. Container Corp. of America, 393 U.S. 333 (1969), many companies followed the practice of verifying their competitors' prices to customers in order to avoid violations of the Robinson-Patman Act. Several federal courts of appeals held this conduct to be lawful. See, e.g., Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), cert.denied, 412 U.S. 943 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), cert.denied, 408 U.S. 928 (1972). However, in United States v. United States Gypsum Co., 438 U.S. 422, 458-459 (1978), the Supreme Court held such conduct to be in violation of the antitrust laws. Moreover, the Supreme Court made it clear that intent was only necessary to establish a criminal violation of the antitrust laws. There could be a civil violation of the antitrust laws by showing anticompetitive effect; you need not also show anticompetitive purpose.*

Finally, intent is a very elusive concept when talking about the vicarious liability of a corporate employer for the acts of its employees.

We have long recognized that deterrence is a very important part of our antitrust policies. We favor and indeed encourage private enforcement because it serves a public purpose -- the deterrence of anticompetitive behavior. Opponents of contribution argue that if contribution is permitted, it will reduce significantly the deterrent effect of the antitrust laws. They say this is so because it would reduce each co-conspirator's liability and permit him to predict more accurately his potential liability. I disagree with this position for a number of reasons. First, it ignores the tremendous deterrent effect of the criminal sanction.

Until the Heavy Electrical Equipment cases in the 1960's, there had been very few defendants who actually served time for antitrust violations. Moreover, until 1974 when Congress passed the Antitrust Procedures and Penalties Act, violations were only misdemeanors with a maximum fine of up to $50,000 and imprisonment up to one year. However, we now have individuals liable to a fine of up to $100,000 and 3 years' imprisonment -- a felony conviction with all of the consequences that follow, such as potential loss of civil rights, etc. The corporate fine was raised to one million dollars. There has been a drastic change in the use of the criminal sanction in the 1970's. In 1972 only one person was jailed; in 1978 there were 29. The time served ranged from 50 days in 1974 to 2,921 days in 1978. The trend has continued. For example, in the first half of fiscal 1981, of the 69 persons indicted, 36 actually served time for a total of 3,111 days. Assistant Attorney General Baxter has spoken repeatedly of his intention to continue the use of criminal cases and to indict individuals in classic price-fixing cases. The fact that to date criminal prosecutions under the Sherman Act are continuing at the historic level achieved during 1980 demonstrates his resolve.

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* The Supreme Court stated:

"Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. See United States v. Container Corp., 393 U.S. 333, 337 (1969); id., at 341 (MARSHALL,J., dissenting). Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct. See Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918)." 438 U.S. at 436 n.13.

Moreover, the regular treble damages and attorneys' fees with respect to damages caused by a defendant plus the costs of antitrust litigation are deterrents, important deterrents.

Second, I know of no case nor have I seen any study or data that suggests a businessman decided to forego illegal activities because of a concern that his company may be responsible for treble damages resulting from the sales of his co-conspirators rather than just his own. Even assuming business judgments are made on the basis of risk analysis, and I have substantial question that that is the case, such analysis should not stop at an evaluation of the potential liability of an antitrust violation. It necessarily must also include an assessment under the present system of the amount of an early settlement permitting a conspirator to get out of litigation and keep part of its illegal profits.

Third, too much deterrence may adversely affect procompetitive behavior. The Supreme Court commented in the Gypsum case that there could be over-deterrence that might make a businessman excessively cautious to the detriment of the public. 438 U.S. at 441. While in that case the Court was talking about conduct in the face of criminal liability, the same principle would apply in the case of massive civil liability.

Finally, the deterrent effect of the antitrust laws may actually be diminished if some wrongdoers are permitted to escape liability altogether.

As to complexity, it is clear that with the creation of every new substantive right by Congress, there is an increase in the burden on the judiciary. It is entirely appropriate to see whether the burden is undue in light of the benefit it confers. Based upon my experiences, I do not believe that establishing the right to contribution will make antitrust litigation unduly complex. The essential ingredient for the management of complex litigation is the early and continuous involvement of the trial judge.* Recent experience has shown that too often lack of effective judicial control is at the root of unreasonably protracted cases.** The Manual for Complex Litigation and the Report of the National Commission for the Review of Antitrust Laws and Procedures both support this conclusion.

The Federal Rules of Civil Procedure give the active trial judge ample tools to handle contribution and ensure that it does not impede the main action.*** This was the conclusion also of this Committee's Report on S.1468 that contribution would not unduly complicate antitrust litigation. Senate Report, at 20.

For years there has been contribution in securities fraud cases, and no unmanageable problems have been noted. In Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.3d 1179 (8th Cir. 1979), the court noted that "no unmanageable administrative problems * * * have been caused by allowing contribution in securities cases." 594 F.2d at 1185.

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* Manual for Complex Litigation, §1.10, at 14 (1977); Report of the National Commission for the Review of Antitrust Laws and Procedures, 80 F.R.D. 509, 526-530 (1979).

** Indeed, the National Commission found that "stronger judicial management and control may be the single best solution for unreasonably protracted cases * * *." 80 F.R.D. at 523.

*** Rule 14(a) provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial."

Rule 16 provides that the trial court may use pretrial conferences to consider "[t]he simplification of the issues" and "[s]uch other matters as may aid in the disposition of the action."

Rule 21 provides that "[a]ny claim against a party may be severed and proceeded with separately."

Rule 42 empowers the trial court to order consolidated or separate trials of any claim or issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy * * *." Rule 42(b).

Finally, as to whether settlement would be adversely impeded, we need to examine the proposed legislation as we have long had a strong public policy favoring the settling of litigation, including antitrust cases. Once again, I do not believe the legislation will impede settlements, based upon comparable experience.

The Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 397 (1975), speaking of comparative negligence, commented that it had not appeared to discourage settlements. 421 U.S. at 408 n.13. Comparative negligence is analogous in many ways to contribution.

Where judgment-sharing arrangements have been reached, they have not inhibited settlements.

I do not deny that certain settlements may be discouraged, particularly the coerced or unfair settlements as well as the sweetheart settlements. With respect to the sweetheart settlement, there will be less incentive for the plaintiff to accept an early, very low settlement from one of the defendants if the plaintiff is not able to transfer a substantial portion of the potential liability of that defendant's sales to the non-settling defendants. And in the case of the coerced settlement, since the non-settling defendant will no longer be faced with industry-wide liability in the event of trial on the merits, there will not be the immense pressure to settle even though that defendant believes it has a good defense on the merits.

The existence of treble damages itself encourages settlement. Since the defendant faces the prospect of trebling the damages suffered by a plaintiff as the result of its unlawful conduct plus attorneys' fees plus its costs of litigation, there is a significant and very legitimate inducement to settle prior to trial. This inducement would, of course, continue under the proposed legislation permitting contribution.

Finally, the Supreme Court stated in Reliable Transfer Co. that an unjust substantive rule cannot be justified simply because it permits speedy, out-of-court settlements. 421 U.S. at 408.

I would now like to turn to the amendments or additions that have been proposed by Assistant Attorney General Baxter. I found them to have substantial merit and to warrant serious consideration of this Committee. I will address each briefly.

First, as to the expansion of contribution and claim reduction to all antitrust litigation, I think this is desirable and should be considered. However, the clearest and the most demonstrated need for contribution has arisen in horizontal price-fixing cases. Congress should not defer necessary relief for those cases, while studying the extent to which there is a need in other cases. There is comparatively little data available, to my knowledge, on the need for contribution and claim reduction in cases other than price fixing. Further study should be done in that area, but not at the expense of delaying the legislation.

We do have data as to the present need for contribution in horizontal price-fixing cases. In addition to the two cases

I mentioned earlier, there is a partially completed survey that shows that there are potentially hundreds of companies that could be subjected to the unfairness of the current rule. I would like to submit a copy of this preliminary survey as an exhibit to my testimony and replace it with the completed survey when it is finished.*

The first available confirmed results show that in just three federal districts (Northern District of Illinois, Southern District of New York, and Northern District of California) and nine additional cases, there are 268 separate corporations defendant against price-fixing claims in multi-defendant cases. Settling defendants and individuals are not shown. Based on data reported by the Administrative Office of the United States Courts, 59 federal districts had 10 or more antitrust cases before them on July 1, 1981.** In those districts, our preliminary survey indicates that some 1,654 corporations were involved in antitrust cases charging price-fixing conspiracies out of a total of some 2,565 private antitrust cases. As can be imagined, a number of these cases are in the process of being settled and the numbers are in a state of flux. We are presently confirming by telephone the status of these cases. When that survey is completed, we will submit the final report to the Committee.

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* This survey is attached as Exhibit B.

** Administrative Office of the United States Courts, Civil Antitrust Cases (N/S 410) by District, Pending as of June 30, 1981 (Sept. 2, 1981). This report indicates 2,827 civil antitrust cases as of June 30, 1981.

Further study should be conducted to determine the need for inclusion of other types of antitrust violations. If subsequent study reveals, as I suspect it might, that contribution and claim reduction provisions should be expanded to cover those cases, they can easily be amended to do so. However, the urgent need today for relief in the area of horizontal price-fixing cases is clear and unmistakable and should be addressed immediately.

I would now like to turn to the method of determining contribution shares. Both S.995 and Assistant Attorney General Baxter contemplate contribution shares being based upon market shares, or sales of goods and services in price-fixing cases. He urges relative responsibility in other cases of antitrust violations. I would urge that relative responsibility be used as the basis in all cases, including price-fixing cases. I know that this would have the same result as market share in almost all horizontal price-fixing cases, but I believe it is a more flexible standard and would create a more just and equitable remedy in the evolution of case-by-case development.

I agree with the need for a short statute of limitations or cut-off period for the assertion of claims to contribution. The six months suggested by Mr. Baxter appears reasonable, and I urge its adoption.

I also agree that the claim for contribution should be tried to the court and not to a jury. This is so because it is an equitable doctrine, and such a complex issue is best left to the court. Such a requirement also fits in with the concept that contribution and claim reduction should to the extent consistent with the fair and speedy determination of litigation be tried at the close of the main action in which contribution or claim reduction rights are asserted. While there may be cases in which contribution will be tried in the main case, it will not always be possible to do so, and a court-tried case after the main case is the most productive solution.

I am not going to address today the issue of the applicability of S.995 to pending cases, as it is my understanding that this is not a subject of this hearing. However, I do recommend that the Committee schedule a prompt hearing on this subject.

In summary, I believe there is a demonstrated need for S.995. As to those additional proposals of Assistant Attorney General Baxter -- except for the immediate expansion of its coverage (which I support in principle) -- they should also be favorably considered by this Committee.

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November 18, 1981

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2462 Rayburn House Office Building
Washington, D.C. 20515

RE: The Antitrust Equal Enforcement Act
of 1981 (H.R. 1242 and H.R. 4072)

Dear Chairman Rodino:

During my testimony concerning antitrust contribution and claim reduction legislation before your Subcommittee on Monopolies and Commercial Law on October 21, 1981, Congressman Seiberling asked whether courts in the United States have permitted contribution in cases involving willful torts. At that time I replied that I knew of no such case but that I was not familiar with what type of contributions may have been permitted in securities fraud cases or in Securities Act and Exchange Act cases. I asked for an opportunity to respond after I researched the question. Based upon my review of the law, I am pleased to advise the Subcommittee that rights of contribution among intentional tortfeasors have been provided in federal law for almost fifty years.*

Rights of contribution have been expressly provided by federal statute. In 1933 and 1934, Congress specifically provided rights of contribution between intentional violators of the securities laws. See Section 11(f) of the Securities

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* In Great Britain, the common law rule against contribution between intentional tortfeasors was eliminated in 1935 when Parliament provided for contribution between joint and several tortfeasors for all torts irrespective of whether the tort was intentional, negligent, or a crime. The Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5 c. 30 (1935).

EXHIBIT A

Act, and Sections 9(e) and 18(b) of the Securities Exchange Act, 15 U.S.C. §§77k(f), 78i(e), 78r(b) (1970).

The federal courts have also fashioned a common law right of contribution in securities fraud cases brought under Securities Exchange Commission Rule 10b-5, 17 C.F.R. §204-10b-5. Obviously before a defendant can claim contribution, it first must be liable under those provisions, and the law is now established that liability does not lie in the absence of *scienter* -- the intent to deceive, manipulate or defraud. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976). Even before the Supreme Court required scienter as an element of a claim under 10b-5, the courts permitted contribution in cases where the defendant seeking contribution had willfully or recklessly perpetrated a fraud on the plaintiff purchaser of securities. *de Haas* v. *Empire Petroleum Company*, 286 F.Supp. 809, 815-816 (D.Colo. 1968), *aff'd in part rev'd in part on other grounds*, 435 F.2d 1223 (10 Cir. 1970); *Alexander & Baldwin, Inc.* v. *Peat Marwick, Mitchell & Co.*, 385 F.Supp. 230, 237-238 (S.D.N.Y. 1974).

In cases involving intentional tortious conduct, the federal courts have permitted the right of contribution essentially on two grounds: (1) that contribution promotes deterrence of violations of the securities laws* and (2) it promotes fair apportionment of liability among defendants.** The Fifth Circuit recently recognized the fundamental right of fairness of contribution even when intentional torts are involved in *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558 (5 Cir. 1981):

> "Persons injured by the willful torts or deceit of others are entitled to full redress but should not be able to play one defendant against another as a gambit."

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* *See*, for example, *Alexander & Baldwin, Inc.* v. *Peat Marwick, Mitchell & Co.*, *supra*, 385 F.Supp. at 238, where the court noted:

> "Because of the deterrent policy of the securities laws, even intentional tortfeasors may obtain contribution so that other tortfeasors will not escape liability. This purpose will be served if defendant tortfeasors are allowed to implead any other tortfeasors involved in the fraud."

** In *Marrero* v. *Abraham*, 473 F.Supp. 1271, 1277 (E.D.La. 1979), the court commented:

> "* * * [T]he purpose of contribution * * * is to allow a fair distribution of the damages among wrongdoers without absolving one at the expense of the others."

Numerous other courts have also extended the right of contribution to willful violators of Rule 10b-5.* In addition, at least two recent federal decisions have interpreted state contribution laws to apply to intentional tortfeasors. *See, e.g.*, *Testa* v. *Winquist*, 451 F.Supp. 388, 392 (D.R.I. 1978) (Rhode Island law); *McLean* v. *Alexander*, 449 F.Supp. 1251, 1266-1267 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3 Cir. 1979) (Delaware law).

Thus, the distinction between intentional and unintentional torts should no longer control the determination of when contribution rights are available.

I hope this will be of assistance to your Subcommittee.

Yours very truly,

Charles B. Renfrew

cc: Honorable John F. Seiberling

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* *See, e.g.*, *Heizer Corp.* v. *Ross*, 601 F.2d 330 (7 Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F.Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2 Cir.), *cert.denied*, 404 U.S. 941 (1971); *Marrero* v. *Abraham*, 473 F.Supp. 1271, 1278 (E.D.La. 1979); *Rice* v. *McDonnell & Co., Inc.*, 442 F.Supp. 952, 954-955 (S.D.N.Y. 1977).

UNRELATED DEFENDANT COMPANIES CURRENTLY LITIGATING MULTIDEFENDANT CASES[1]

1. Abbott & Associates
2. AC Company
3. Admiral Heating & Ventilating Co.
4. A. E. Staley Manufacturing Co.
5. Alcan Aluminum Corporation
6. Allstate Insurance Co.
7. Alpha Portland Industries, Inc.
8. Aluminum Company of America
9. Amerada Hess Corporation
10. American Art Clay Company
11. American Crayon Company
12. American Export Lines, Inc.
13. American Maize Products
14. American Sunroof Corp. Co.
15. Amstar Corporation
16. Amtel, Inc.
17. Anderson & Litwack Co.
18. Anheuser-Busch, Inc.

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[1] Companies listed are litigating defendants as of November 1, 1981, in multidefendant antitrust cases involving claims of price fixing in three federal courts: Northern District of California, Northern District of Illinois, and Southern District of New York, as well as nine additional cases in other districts: Art Materials Antitrust Litigation, MDL 436; Cement and Concrete Antitrust Litigation, MDL 296; Corn Derivatives Antitrust Litigation, MDL 414; Corrugated Container Antitrust Litigation, MDL 310; Exterior Siding Antitrust Litigation, MDL 454; Petroleum Products Antitrust Litigation, MDL 150; Plywood Antitrust Litigation, MDL 159; Salmon Fishery Antitrust Litigation, MDL 249; and Standard Screw Antitrust Litigation, MDL 443.

Some companies are named in more than one case, but listed only once. Individuals and related companies are not listed.

This survey is based on a report, Administrative Office of the United States Courts, Civil Antitrust Cases (N/S 410) by District, Pending as of June 30, 1981 (Sept. 2, 1981), review of the pleadings and docket entries of the courts, and confirmation by telephone with counsel of record. The patience and assistance of the personnel of the various federal courts and of the Administrative Conference are gratefully acknowledged.

EXHIBIT B

19. Arkansas Cement Corporation
20. Armada Corp.
21. Ash Grove Cement Company
22. Associated Hospital Service of New York (Blue Cross)/United Medical Service, Inc. (Blue Shield)
23. Associated Milk Dealers, Inc.
24. Associated Milk Producers, Inc.
25. Atlantic Container Line, Ltd.
26. Atlantic Richfield Company
27. Baird & Warner, Inc.
28. Baltimore Football, Inc.
29. Bellis-Hanley, Inc.
30. Bethlehem Steel Corporation
31. Beverly Heating Co.
32. Beyer Farms, Inc.
33. Binney and Smith, Inc.
34. Borg, Inc.
35. Bumble Bee Seafoods
36. Byness Inc.
37. Byrnes Brothers
38. Canine Eye Registration Foundation
39. Capitol Aggregates, Inc.
40. Cargill, Inc.
41. Caribou Four Corners, Inc.
42. Carlson Real Estate
43. Centex Corporation
44. Central Milk Producers Cooperative
45. Central Milk Sales Agency
46. Cheker Oil Co.
47. Chicago Bears Football, Inc.
48. Chronicle Publishing
49. Chrysler Motor Corp.
50. Cincinnati Bengals, Inc.
51. Citadel Cement Corporation
52. Cities Service Company
53. Cleveland Browns, Inc.
54. Climatemp, Inc.
55. Consolidated Freightways Corp.
56. Consolidated Sales Associates, Inc.
57. Continental Oil Company
58. Coplay Cement Manufacturing Co.
59. Corn Sweetners, Inc.
60. CPC International, Inc.
61. Crone Associates
62. Crouse Sheet Metal Works, Inc.
63. Crown Oil Corp.
64. Crystal Lake Associated Listing Service
65. C. W. Johnson
66. Cyprus Hawaiian Cement Corp.
67. Dairylea Cooperative, Inc.

68. Dallas Cowboys Football Club, Inc.
69. Dart Containerline Company Limited
70. Dellwood Foods, Inc.
71. The Detroit Lions
72. Di Salvo Trucking Co.
73. Distribution East Corp.
74. Drewry's Limited U.S.A., Inc.
75. Duncan Petroleum Transport, Inc.
76. Dundee Cement Co.
77. Durbin-Stovall Associates
78. East Texas Motor Freight Lines, Inc.
79. Economy Mechanical Industries, Inc.
80. Elco Industries, Inc.
81. Elmhurst Milk & Cream Co., Inc.
82. Emanuel Mesh d/b/a Crown Cream Co.
83. Empire Sports, Inc.
84. Esses-Costello Real Estate
85. Evco Associates
86. Exxon Corporation
87. F. E. Moran, Inc.
88. Filtrol Corp.
89. The Five Smiths
90. The Flintkote Company
91. Fox & Carskadon, Inc.
92. Franciscan Lines, Inc.
93. Fred Buck d/b/a Fred Buck Realtor
94. FTC Communications, Inc.
95. General Cable Corporation
96. General Portland, Inc.
97. Georgia-Pacific Corporation
98. Getty Oil Company
99. Giant Portland Cement Co.
100. Gideon Engineering
101. Glass Specialty Co., Inc.
102. Gleason Corporation
103. Gleisner Coach Works Corp.
104. Globe Glass & Trim Co.
105. Globe Wholesale Company
106. Gold Medal Farms, Inc.
107. Grain Processing Corporation
108. Granex Corp., USA
109. Green Bay Packers, Inc.
110. Grigus Inc.
111. Gulf Oil Corporation
112. Hans Jensen & Sons, Inc.
113. Hapag-Lloyd Aktiengesellschaft
114. Harold Collins
115. Hearst Corp.
116. Highwood Service, Inc.
117. Hillsborough Development Co., Inc.
118. Houston Oilers, Inc.

119. Hubinger Co.
120. Hunter Clark Ventilating
121. Hygrade Milk & Cream Co., Inc.
122. Ideal Basic Industries, Inc.
123. Ideal Heating Co.
124. Illinois-California Express, Inc.
125. Illinois Heating & Ventilating Co.
126. IML Freight, Inc.
127. ITO Tour Service Inc.
128. ITT World Communications, Inc.
129. JAC Tours Inc.
130. Jack Richard Simplot
131. Japan Travel Bureau International, Inc.
132. Jetour USA, Inc.
133. Joc Oil, Inc.
134. John H. Fuhler Real Estate
135. Kaiser Aluminum and Chemical Sales, Inc.
136. Kelleher Inc.
137. Keystone Portland Cement Co.
138. Kinetsu International Inc.
139. Kirchberg Realty
140. Lawrence Aviation Industries, Inc.
141. Leeway Motor Freight, Inc.
142. Lehigh Portland Cement Co.
143. Leonard H. Tose d/b/a Philadelphia Eagles Football Club
144. Lone Star Industries, Inc.
145. Los Angeles Rams Football Co.
146. Louisville Cement Co.
147. Lu Do & Lu Ym Corp.
148. M & M Glass Service
149. Manchester Cream Company, Inc.
150. Manufacturers Hanover Trust Co.
151. Marathon Oil Company
152. Marquette Co.
153. City of Martinez
154. Martin Marietta Corp.
155. Mead Corp.
156. Meadowbrook Farms, Inc.
157. Medusa Corporation
158. Mehring & Hanson-Wendt
159. Mellish & Murray Co.
160. Metropolitan Tobacco Company, Inc.
161. Midwesco-Adams Engineers, Inc.
162. Milton Bradley
163. Minnesota Vikings Football Club, Inc.
164. Missouri Portland Cement Co.
165. Mobil Oil Corporation
166. Modern Tobacco Company, Inc.
167. Monarch Cement Company
168. Monolith Portland Cement Company
169. Morris Park Farms, Inc.

170. Moto Heating-Ventilating-Air Conditioning Corp.
171. The Narowetz Co.
172. National Cement Company, Inc.
173. National Football League
174. National Gypsum Co.
175. National Heat & Power Co.
176. National Starch and Chemical Corp.
177. Navajo Freight Lines, Inc.
178. Nelbro Packing Company
179. New England Patriots Football Club, Inc.
180. New Orleans Saints
181. New York Football Giants, Inc.
182. New York Jets Football Club, Inc.
183. New York Mercantile Exchange
184. Nippon Express USA
185. Nippon Travel Agency Pacific
186. NL Industries, Inc.
187. Northern Illinois Realty Service
188. Northwestern Industrial Piping Inc.
189. Northwestern States Portland Cement Co.
190. Northwest Glass & Trim Service
191. N.T.A. Pacific, Inc.
192. Nu-Service Tobacco Co., Inc.
193. Oakland Raiders
194. OKC Corp.
195. Oregon Portland Cement Co.
196. Pacific Intermountain Express Co.
197. Pacific Lie Sure Management Corp.
198. Pacifico Creative Service, Inc.
199. Penick & Ford, Ltd.
200. Pen Pacific Commodities
201. Phelps Dodge Industries, Inc.
202. Phillips Getschow Co.
203. Phillips Petroleum Company
204. Piping Systems Inc.
205. City of Pleasant Hill
206. Portland Cement Company of Utah
207. Powerine Oil Company
208. Pullman Sheet Metal Works, Inc.
209. Puretest Milk Co., Inc.
210. R. A. Martin Co.
211. RCA Global Communications, Inc.
212. Red Ball Motorfreight, Inc.
213. Reed and Prince Manufacturing Company
214. Reliable Sheet Metal Works, Inc.
215. Revere Copper and Brass, Inc.
216. Reynolds Metals Company
217. Roadway Express, Inc.
218. Robert Irsay Co.
219. Roblin Industries, Inc.
220. San Antonio Portland Cement Company

221. Sanders-Langsam Tobacco Co., Inc.
222. San Francisco 49ers
223. Santee Portland Cement Corporation
224. Sea-Land Service, Inc.
225. Seatrain Lines, Inc.
226. Sharp Electronics Corp.
227. Shell Oil Company
228. S. J. Reynolds Co.
229. Standard Brands Inc.
230. Standard Oil Company of California
231. Standard Oil Company (of Indiana)
232. Standard Oil Company (Ohio)
233. State Farm
234. Steel City Ventilating & Sheet Metal Co.
235. Sun Oil Company
236. Tampa Bay Buccaneers, Inc.
237. Texaco Inc.
238. Textron, Inc.
239. Tip Top Farms, Inc.
240. Titanium Metals Corp. of America
241. Tote-Cart Company
242. Transco Lines, Inc.
243. Tri-Eagle Dairies, Inc.
244. TRT Telecommunications Corp.
245. Union Oil Company of California
246. United Charter Service
247. United Coconut Oil Mills, Inc.
248. United Coconut Planters Park
249. United States Lines, Inc.
250. United States Steel Corporation
251. UNR Industries, Inc.
252. Valley Cement Industries, Inc.
253. Valley Stream Distributors Co., Inc.
254. Visit USA Bureau, Inc.
255. Voris Inc.
256. Wagner Heating & Ventilating Co.
257. Wards Cove Packing Company
258. Western Gillette, Inc.
259. Western Union International, Inc.
260. Weyerhaeuser Company
261. Whitehall Cement Mfg. Co.
262. Wholesale Tobacco Distributors of New York, Inc.
263. Willamette Industries
264. Windsor Heating
265. W. Wanzenberg & Co.
266. Wyandotte Cement Incorporated
267. Yellow Freight System, Inc.
268. Zack Co.

PRELIMINARY SUMMARY OF SURVEY DATA

Total number of defendants in civil antitrust cases involving claims of price-fixing, pending as of June 30, 1981. [This is a preliminary/partial survey based upon review of the docket sheets and pleadings of most of the 59 districts during the period October 6 through December 4, 1981. The results are in the process of being confirmed with counsel of record, by telephone.]	1,654
Total number of civil antitrust cases pending in the 59 districts surveyed, as of June 30, 1981.	2,565
Total number of civil antitrust cases pending in all 95 districts as of June 30, 1981.	2,827

DISTRICTS SURVEYED

	District	Number of cases pending as of June 30, 1981
1.	District of Columbia (0090)	78
2.	Maine (0100)	12
3.	Massachusetts (0101)	93
4.	Rhode Island (0103)	18
5.	Connecticut (0205)	47
6.	New York, Northern (0206)	20
7.	New York, Eastern (0207)	63
8.	New York, Southern (0208)	216
9.	New York, Western (0209)	19
10.	New Jersey (0312)	71
11.	Pennsylvania, Eastern (0313)	159
12.	Pennsylvania, Middle (0314)	14
13.	Pennsylvania, Western (0315)	22
14.	Maryland (0416)	33
15.	North Carolina, Eastern (0417)	2
16.	North Carolina, Middle (0418)	10
17.	North Carolina, Western (0419)	6
18.	South Carolina (0420)	12
19.	Virginia, Eastern (0422)	11
20.	Virginia, Western (0423)	11
21.	West Virginia, Southern (0425)	10
22.	Alabama, Southern (0528)	16
23.	Florida, Middle (053A) partial survey	54

District	Number of cases pending as of June 30, 1981
24. Georgia, Northern (053E)	41
25. Louisiana, Eastern (053L)	139
26. Louisiana, Middle (053N)	12
27. Texas, Northern (0539)	82
28. Texas, Eastern (0540)	13
29. Texas, Southern (0541)	130
30. Texas, Western (0542)	31
31. Kentucky, Western (0644)	16
32. Michigan, Eastern (0645)	46
33. Michigan, Western (0646)	19
34. Ohio, Northern (0647)	75
35. Ohio, Southern (0648)	30
36. Tennessee, Western (0651)	16
37. Illinois, Northern (0752)	173
38. Illinois, Central (0753)	12
39. Indiana, Northern (0755)	15
40. Indiana, Southern (0756)	18
41. Wisconsin, Eastern (0757)	19
42. Arkansas, Western (0861)	11
43. Iowa, Southern (0863)	12
44. Minnesota (0864)	43
45. Missouri, Eastern (0865) partial	19

District	Number of cases pending as of June 30, 1981
46. Missouri, Western (0866)	43
47. Arizona (0970) partial	67
48. California, Northern (0971)	138
49. California, Eastern (0972)	21
50. California, Central (0973)	119
51. California, Southern (0974)	19
52. Hawaii (0975)	32
53. Oregon (0979)	33
54. Washington, Eastern (0980)	16
55. Washington, Western (0981)	40
56. Kansas (1083)	20
57. New Mexico (1084)	12
58. Oklahoma, Western (1087)	15
59. Utah (1088)	21
Total:	2,565

DISTRICTS NOT SURVEYED

District	Number of cases pendin as of June 30, 1981
1. New Hampshire (0102)	7
2. Puerto Rico (0104)	5
3. Vermont (0210)	4
4. Delaware (0311)	6
5. Virgin Islands (0391)	1
6. West Virginia, Northern (0424)	1
7. Alabama, Northern (0526)	6
8. Alabama, Middle (0527)	6
9. Florida, Northern (0529)	5
10. Florida, Southern (053C)	94
11. Georgia, Middle (053G)	2
12. Georgia, Southern (053J)	6
13. Louisiana, Western (0536)	6
14. Mississippi, Northern (0537)	3
15. Mississippi, Southern (0538)	8
16. Canal Zone (0592)	0
17. Kentucky, Eastern (0643)	9
18. Tennessee, Eastern (0649)	3
19. Tennessee, Middle (0650)	9
20. Illinois, Southern (0754)	1
21. Wisconsin, Western (0755)	2
22. Arkansas, Eastern (0860)	9

District	Number of cases pending as of June 30, 1981
24. Nebraska (0867)	6
25. North Dakota (0868)	3
26. South Dakota (0869)	3
27. Alaska (097X)	3
28. Idaho (0976)	4
29. Montana (0977)	6
30. Nevada (0978)	5
31. Guam (0993)	2
32. Northern Mariana Islands (0994)	0
33. Colorado (1082)	26
34. Oklahoma, Northern (1085)	2
35. Oklahoma, Eastern (1086)	3
36. Wyoming (1089)	2
Total:	262

The **Chairman**. Our next witness is Mr. Robert Taylor of the Section of Antitrust Law of the American Bar Association and Pillsbury, Madison & Sutro, San Francisco, Calif.

Mr. Taylor, you do not have a prepared statement, do you?

Mr. **Taylor**. Mr. Chairman, I do not have a prepared statement.

The **Chairman**. All right. You may proceed.

STATEMENT OF ROBERT P. TAYLOR, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, AND PILLSBURY, MADISON & SUTRO, SAN FRANCISCO, CALIF.

Mr. **Taylor**. For the record, my name is Robert Taylor. I practice law with the San Francisco firm of Pillsbury, Madison & Sutro. I have been an antitrust practitioner for about 13 years.

I am appearing here, Mr. Chairman, at the request of the Senate Judiciary Committee, as the designate of the Antitrust Section of the American Bar Association. In 1979, we prepared a report on the subject of contribution. I would like to ask that that report be included as a part of the record of this proceeding.

The **Chairman**. We have a copy of the report. Thank you very much.

Mr. **Taylor**. In the report of the Antitrust Section, essentially we focused on what was then pending Senate bill 1468, which was identical to current Senate bill 995. Our report takes the form of a comment on S. 1468, and includes a legislative proposal as an alternate to S. 1468. I thought this morning it might be helpful if I simply touched briefly on some of the differences between the section's legislative proposal and S. 995.

Let me say by way of background that at the time the Antitrust Section began to look at the subject of contribution we were not aware that there was a pending piece of legislation. Indeed, it may not have even been in existence at the time. We were concerned, instead, with analyzing the outcome of the eighth circuit decision in the *Professional Beauty Supply* case. The focus of our study shifted when Senator Bayh offered his amendment to then-pending bill S. 390, which amendment was subsequently withdrawn and reintroduced as S. 1468.

The primary difference between the section's legislative proposal and S. 995 is one of scope—whereas S. 995 is limited in its scope to price-fixing cases, the section's proposal would go beyond that and provide for contribution in all antitrust cases. The section does not disagree with the views expressed a minute ago by Judge Renfrew that the greatest need for contribution has arisen in the price-fixing cases. Nevertheless, for reasons similar to those articulated by Assistant Attorney General Baxter, we think that it would be preferable to have contribution available to defendants in all types of cases.

I might note in this regard that there are some very compelling arguments to be made on behalf of defendants situated similarly to those in the *Professional Beauty Supply* case, which, of course, was not a price-fixing case and under the pending legislation would not qualify for rights of contribution. In addition, I would note that when this committee reported out S. 1468 it recognized that it was limiting the right of contribution to price-fixing cases, and it did so with the express hope that perhaps a right of contribution would develop in the courts in other types of cases. However, given the rationale used by the Supreme Court earlier this year in the *Texas Industries* case, unless the Congress enacts a contribution bill applicable to other types of cases, I think there is little prospect that the courts are going to develop a rule of contribution for such cases.

The only rational argument that I have heard advanced for a distinguishing between price-fixing cases and other types of cases is that price-fixing cases lend themselves to an easily applied formula for deciding what each contribution share will be. That brings me to the second major difference between the Antitrust Section's proposal and S. 995. Whereas S. 995 would determine contribution shares on a market share basis, the section proposes as does the Department of Justice, a relative responsibility formula. I think that the relative responsibility formula proposed by the Antitrust Section is different from that proposed by the Department of Justice, and I will touch on that difference in a minute.

Our purpose in adopting a relative responsibility standard was to give the courts more flexibility. Market share can and probably should be used as the measure of contribution shares in most cases where market share is appropriate. But market share only works in price-fixing cases and perhaps certain other kinds of horizontal antitrust cases. Market share certainly does not work in a vertical case such as the *Professional Beauty Supply* case. It is extremely difficult to articulate any objective criteria for apportioning contribution liability that is universally applicable to all cases. For that reason, we concluded that a relative responsibility standard would give the courts needed flexibility to develop on a case-by-case basis some workable rules of law.

Another major difference between the section's proposal and S. 995 concerns when contribution claims must be brought. The section's proposal contains a statute of limitations. S. 995 on the other hand is silent on this subject, and I believe that as a practical matter that will create a very serious problem, unless it is remedied.

Let me note here that the Justice Department's proposal would provide that a claim for contribution can be brought within 6 months after the conclusion of the main action, whereas the section's proposal would require that most contribution claims be filed during the pendency of the main action. The 6-month provision proposed by the Justice Department is certainly preferable to no statute of limitations at all, but it may lead to the wasteful use of judicial resources by requiring duplicate trials of some issues.

When we attempted, within the section, to arrive at a proper balance between the rights of all of the parties, one cornerstone of our analysis was a belief that in the great majority of cases it is preferable that antitrust contribution claims be litigated in the same proceeding with the main action. We believe that the most feasible way to bring this about is to specify a short limitations period and one which will insure the filing of contribution claims during the pendency of the main action.

Contribution is going to complicate life for defendants, because it is going to impair, to some extent, their ability in a conspiracy case to conduct a joint defense. As a result of that, it is likely that defendants in the main action will want to defer as long as possible the filing of their contribution claims. That being the case, it is unlikely that such claims will ever be brought until after the main action has ended, unless the statute compels otherwise.

This is of particular importance when one or more of the contribution defendants were not parties to the main action. All proposals—S. 995, the section's proposal and the Department of Justice's proposal—would permit the filing of antitrust contribution claims against individuals and companies who were not defendants in the main action. The statute of limitations we propose will force virtually all contribution claims to be filed during the pendancy of the main action, so that a contribution defendant who was an absentee defendant in the main action will at least have the opportunity, either by consolidation or by intervention, to influence the outcome in the main action. If the absentee defendant is not brought into the main action, there are two possible alternatives, both undesirable. Either the absentee defendant will be required to accept the conclusions in the main action—both the findings that the plaintiff is entitled to recover and the findings with respect to the amount of the plaintiff's damages—or, alternatively, the absentee defendant will be entitled to a relitigation of the underlying plaintiff's claim in the main action. The first alternative has obvious due process problems, and the second we considered a prodigious waste of judicial resources.

The section's proposal also creates a period of 1 year during which contribution claims need not be filed. We thought it desirable to provide a period of time at the beginning of a lawsuit during which the defendants can make their initial pretrial motions and have some initial discovery to find out what the case is about. Very few, if any, antitrust cases reach the point within a year where it would be prejudicial to bring in some other defendant. There is no magic in the 1-year period. It could be shortened to 3 or 4 months, but I think there should be some initial period at the outset during which contribution claims need not be filed. Thereafter, however, it is our view that such claims should be filed very promptly after they are discovered.

I have one further comment on the proposal of the Department of Justice, insofar as it differs from that advanced by the Antitrust Section. The Department of Justice proposal would apply a market share formula for determining contribution shares in horizontal price-fixing cases and, a relative responsibility formula in all other cases. Our proposal would use a relative responsibility formula for the determination of contribution shares in all antitrust cases. I think that as a practical matter relative responsibility as proposed by the section, will translate into market share where a market share determination works. I have some question as to whether it is advisable to arbitrarily draw distinctions, as a matter of statutory law, between price-fixing cases and other kinds of cases, because that invites the parties to posture with respect to the way in which a case is pleaded. I think in practice it is going to be somewhat difficult to apply the provision proposed by the Department of Justice. For example, I was once involved in a case that had six defendants. Four of them were accused of price fixing, and two of them were accused of having intentionally and by agreement stayed out of the marketing area where the price fix was alleged to have occurred.

I do not know whether or not that was a price-fixing case. Irrespective of whether you say it is or it is not, however, it illustrates that somewhere you have to draw a line between price-fixing cases and other cases. Wherever you put that line, you invite the parties to posture around it. I think it is unnecessary.

That concludes my statement, Mr. Chairman. I am happy to answer any questions.

The CHAIRMAN. Thank you very much.

Mr. Taylor, it would appear that there is a substantial difference between the proposal of the ABA Antitrust Section and that of the Justice Department regarding the appropriate time to litigate contribution and claim reduction matters. You suggest it be done during the main action, and Professor Baxter suggests that it be done in most cases after the main action in a separate proceeding.

If I understand your testimony correctly, ABA feels that in a very direct sense the fate of the contribution defendant is tied to the fate of the defendants in the main action, and therefore, a contribution defendant should be allowed to participate in the main action whenever possible.

On the other hand, Professor Baxter seems to believe that litigating contribution claims in the main action could complicate matters so much as to prejudice the case of the plaintiff.

How can this bill resolve these conflicting interests?

Mr. TAYLOR. Mr. Chairman, it is my belief that the ABA proposal does not require that the two questions be adjudicated at the same time. It commonly happens in general tort litigation where there are indemnity claims, for example, that all of the parties are brought in and made a party to the main action, but the question of indemnity is deferred until the outcome of the main action. Indemnity is then either resolved in a separate trial or resolved by the court based on the evidence adduced in the main action. I would think that that would be the preferable manner of resolving contribution claims in a great many of these cases.

It may well be that for particular reasons on particular facts the trial judge does not want to permit the bringing in of contribution defendants—the people I referred to as the absentee defendants. In that circumstance, the trial judge has the power to require a separate proceeding. But he decides to have that second adjudication of the underlying case because the interests of justice require it. The second trial would not occur antomatically as a matter of statutory law. Under the statutory proposal advanced by the Department of Justice, I think a second trial would occur, commonly if not always.

The CHAIRMAN. Mr. Taylor, concern has been expressed that a system of contribution and claim reduction should not be available to those that intentionally violate our antitrust laws. In some instances this has been interpreted to mean that those who commit per se violations should not be able to claim the benefits such a system would provide.

I notice that you address this question in your report on contribution legislation. Would you elaborate on this point for the committee?

Mr. Taylor. There are, of course, a few antitrust cases which involve intentional torts, as that term has developed at common law. I question, however, whether even these should always be denied contribution. The trend of the law in general tort litigation is away from drawing such a distinction between intentional and nonintentional torts. In that sense, I think that history is refuting those who would draw the distinction in antitrust cases.

More importantly, however, there are many, many antitrust cases that, although they may be characterized by some as intentional torts, are not intentional in any meaningful sense. Judge Renfrew pointed out a few minutes ago that the U.S. Supreme Court in the *Gypsum* litigation makes very clear that intent is not an element for recovery in a civil case. The case law demonstrates numerous occasions on which a company was held accountable for conduct that it thought lawful.

Moreover, I have serious difficulty with the concept of intent when it is superimposed upon concepts of vicarious liability. We hold a corporate defendant liable under the antitrust laws even though that corporate defendant may have had a strong policy in favor of antitrust compliance and even though an individual employee may have been violating the compliance policy as much as he was violating the law. Whatever may be the wisdom of a rule of strict liability in such a case, it is not an intentional tort in any meaningful sense.

The Chairman. Thank you very much.

I would like to say for all of the witnesses that we may send you some questions to answer, if you would be kind enough to answer them for the record.

Mr. Taylor. I will be happy to, Mr. Chairman.

The Chairman. Thank you very much, Mr. Taylor. You are now excused.

Our last witness is Prof. Frank H. Easterbrook of the University of Chicago.

Please come forward, Professor. Professor Easterbrook, I have to leave in about 5 minutes to go and open the Senate, but I wish you would continue your testimony with Mr. Cannon here until I get back.

STATEMENT OF PROF. FRANK H. EASTERBROOK, UNIVERSITY OF CHICAGO, CHICAGO, ILL.

Mr. Easterbrook. I will be happy to do that, Mr. Chairman. My statement summarizes a longer article, and the statement itself makes most of the points.

The Chairman. Do you want to put your entire statement in the record and then just talk off the cuff for 5 minutes?

Mr. Easterbrook. That is exactly what I would like to do.

The Chairman. We have your full statement before us. Could you very quickly, in about 5 minutes, give me the thrust of your statement?

Mr. Easterbrook. Yes; what I would like to do is make some claims about the fairness of contribution and about the administrative costs of the contribution system. They are renegade claims, I suppose, because I disagree with the other three witnesses, and I hope the committee will not subject my assertions to claim reduction.

Whether contribution is desirable depends on two things. One is the appropriate role of fairness in the administration of the antitrust laws, and the other is whether eliminating the whipsaw effect of settlement, which increases the recoveries of plaintiffs, is a good idea.

First, about fairness, Judge Renfrew said that fairness in cases of intentional torts has been a basic element of the Anglo-American jurisprudence and indeed part of due process. I hate to take issue with somebody so eminent, but I must.

If one looks at the State laws with respect to contribution, one sees that only one State, New York, provides for contribution in cases of intentional torts.

If one looks at cases of crimes—and antitrust violations are, after all, felonies—one is aware that there are a lot of instances of utter lack of fairness, as fairness is ordinarily understood.

For example, the prosecutor has discretion to pick and choose among those people who have committed a crime, to prosecute some and put them in jail for 20 years, and leave others alone. Or a jury has complete discretion to acquit those whom it feels like acquitting. Those who are convicted have no claim of unfair treatment. So the argument for fairness in cases of intentional wrongdoing is not one that has been recognized in our jurisprudence.

At all events, there is some difficulty in figuring out what is fair. Ordinarily businesses take risks. The risk of antitrust liability is just another risk. There is a risk that the offense will be discovered, a risk that the firms will be held liable, a risk of change in the law, and so on.

One way of thinking about fairness in risky cases is the same way one thinks about fairness in going into a risky venture in, introducing a new product, or indeed going to the roulette table in Las Vegas.

One thinks of something as fair if people play under known odds—known risks—and if they are not defrauded about those odds. If I enter a game in which I know what I am getting into and can make my decisions about whether to play or not, it is not thought to be unfair that the game comes out adversely to me.

It is important, I think, to distinguish equity when people are making their decisions to become involved from inequality There are bound to be inequalities. Some antitrust violations will never be discovered. In other antitrust cases juries will acquit against the evidence. In other antitrust cases no one will elect to prosecute. In some antitrust cases plaintiffs will elect to collect damages from some defendants but not from others. There is a series of risks, all of which can be taken into account by firms when they make their decisions.

On top of that there is another layer, which has been disregarded so far in the debate about contribution. That layer is the interests of shareholders.

It is very difficult to think of firms as entities without considering the role of the shareholders. Most people have their shareholding interests well diversified. Those who hold mutual funds, those who hold retirement interests, and so on, have interests in many firms.

If they had their choice about what would be done with the contribution rule, they would not choose a rule that spread damages equally among firms, because the fact that they hold interests in many firms automatically spreads the payments, as they see things.

What they would like is a rule that holds as low as possible the total recovery collected from firms. That total recovery is made up of two things: one is the damages paid to plaintiffs, and the other is the cost of litigating the cases.

From the point of view of shareholders who either do or can hold stakes in many firms, the administrative costs—which one firm may see as desirably incurred in order to foist off part of the liability on other firms—are simply a deadweight loss. They get nothing as a result of the spreading of liability.

The second point I would like to highlight this morning is the question of the ease of administration—or the lack of it—in contribution and claim reduction legislation.

It seems to me that, if contribution is going to be instituted, the Assistant Attorney General's approach of claim reduction by sales is the most desirable approach. Approaches based on relative responsibility and similar criteria strike me as swamps. What is relative responsibility? The "standard" essentially boots the problem to district judges or to juries and leaves them utterly without standards.

Because the amount of money that firms will spend litigating a case depends largely on how big are the stakes, they will spend a lot more litigating a $500 million case than litigating a speeding ticket. Antitrust cases have large stakes indeed. To throw to the courts a question and leave them with essentially complete discretion is to invite parties to spend a great deal of the total stakes of the case in litigating about it.

Claim reduction ought to proceed in the simplest possible way, and apportionment by sales is probably the simplest way. Unfortunately, that method does not work very well for anything other than territorial divisions or price fixing. One could make an argument for a very mechanical rule for other contribution situations, if there is to be contribution. The court could take the stakes and divide them by the number of defendants found liable. This would be quite mechanical: If there are three defendants involved, liability is split three ways, and if liability is to be reallocated further the defendants could contract among themselves.

The problem, I suppose, with an equal division rule is that it will then be alleged that defendants had different roles and that equal division is itself unfair and rather erratic. Yet, given my position on fairness—that is, that one thinks of something as fair according to calculations made when consideration has begun—an equal division rule would not be fundamentally unfair.

The **Chairman**. We have a few questions to ask you, and perhaps you can answer the others for the record.

Mr. **Easterbrook**. Thank you. I shall be happy to.

I have just a little more on the administrative costs of a system of contribution. It seems to me that one thing that is invited by any system of contribution is a rather complex set of evasions.

Judge Renfrew talked about what had happened in the States that have adopted contribution legislation. The States went through several rounds. The early versions of contribution that were adopted by some courts in the 1920's and by statute in the 1930's collapsed almost entirely as a result of rather interesting evasive tactics. Even today, those who litigate tort cases will say that contribution does not work very well.

A variety of the tactics has been used. There are what are called Mary Carter agreements, in which the plaintiffs and one defendant agree that, although the plaintiff will not dismiss this defendant or enter into any formal settlement, the plaintiff will neglect to collect his share of the judgment from that defendant. In exchange, the defendant agrees to support the plaintiff or pay some amount of money to the plaintiff in the course of the litigation.

Mary Carter agreements easily could be used in antitrust cases under a contribution bill, as I understand the pending legislation, and they would reproduce to a substantial degree the whipsaw effect that is now complained of under no contribution.

One can imagine other interesting tactics. For example, in the paper industry there are now at least three and maybe more antitrust suits pending against the defendants. I assume that contribution legislation would require that claim reduction apply to each of the agreements. So, for example, in the *Fine Paper* antitrust litigation only those who were implicated in *Fine Paper* would get the benefit of claim reduction.

But because many of the defendants are involved in multiple roles in the different aspects of these antitrust claims, it would be possible for plaintiffs who have bought many kinds of paper, to strike an agreement with the defendants in one case. The agreement would purport to be with the defendants in that case, but actually it would be on account of sales in a different case. That would throw the whole claim reduction system out of whack. It is very difficult to reduce the claims if you cannot tell what exactly has been settled.

I do not mean to accuse either plaintiffs or defendants of proclivity for dishonest treatment of the rules, but there is bound to be a substantial amount of elasticity in the joints of any one of these rules, so that defendants in one case can purport to be, and perhaps will think they are, settling for a rather large number of cents on the dollar in exchange for some remission in another case. But the settlement will appear to be in one case, and that will throw off the claim reduction system.

The "relative responsibility" rule also has been with us before in different senses. We had relative responsibility in the antitrust law under the pari delicto doctrine which was abolished by the Supreme Court in the *Perma Life Mufflers* case—*Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134 (1968).

Judges under the pari delicto doctrine were supposed to find people who were relatively responsible for an antitrust offense and to hold them not entitled to recover. The pari delicto doctrine had broken down in the lower courts long before the Supreme Court put it to rest, in large measure because it is almost impossible to tell who is responsible for a given antitrust violation and how great that responsibility is.

One of the curiosities, by the way, of that doctrine is that it has been resurrected in the lower courts on the theory that Justice White's concurrence in *Perma Life* meant that it really had not died. In recent years there have continued to be a number of cases in which judges have struggled to determine responsibility and come up with, it seems to me, few if any standards.

So I am much less sanguine that Assistant Attorney General Baxter, if a relative responsibility provision is written into the law, judges in the course of common law adjudication, over a period of years in a number of cases, will be able to work out what relative responsibility is. If we do not have the answer after decades upon decades of litigation under the pari delicto doctrine, it is difficult to see what we would get under the contribution legislation.

My conclusion for the committee is just this: Contribution is not required by notions of fairness, if fairness is viewed ex ante. It does not seem to me that contribution benefits shareholders, who can and often do hold diversified portfolios of stock, and it does seem to me that contribution would complicate and increase the cost of antitrust litigation. Other things equal, there is no reason to bear those costs.

That concludes my oral statement, and I would be happy to answer any questions from the committee.

Mr. CANNON [acting chairman]. Thank you, Professor.

Senator Thurmond left a few questions. Perhaps we could ask you these and then submit more questions for the record.

You recognize the possibility that some groups may be called on to pay damages disproportionately. I would note that that is exactly what happened in the *Olson Farms* v. *Safeway* case, where a small company was burdened with the full liability of much larger companies which the plaintiff chose not to sue.

Might such a tendency not only result in disproportionate burdens on one segment of industry but also in overdeterrence, which could be particularly harmful to smaller businesses trying to compete with larger and possibly less risk-averse companies?

Mr. EASTERBROOK. I think there are two answers to that question. The first is: Why would rational plaintiffs, as a rule, attempt to impose disproportionate liability on smaller defendants?

Ordinarily, in any case involving large sums, the first thing in the plaintiff's mind is having a solvent defendant, and driving a given defendant to the brink of ruin is not a way to insure collection of the judgment.

On top of that, because antitrust cases are cases triable to juries, when plaintiffs pick defendants who are relatively small and relatively less responsible, they are simply inviting a loss on the merits.

So I do not think it is a common or, when it exists, rational strategy for plaintiffs to pick on small defendants.

The second half of my answer is: So what? Suppose plaintiffs always pick on small firms. Then what does that tell us?

Let us suppose, to take the extreme case, that there were a legal rule requiring the smallest defendant to pay the whole damages.

What would happen? I think that rule would be quite good at deterrence and in fact leave small defendants paying nothing at all.

Professor Landes, Judge Posner, and I give in our article an example about the auto industry. Suppose the people in the auto industry sat down in your classic smoke-filled room and decided whether to fix prices.

The first thing that would happen is that the smallest firm, American Motors, would think: "Wait a minute. If I participate in this conspiracy, I am going to have to pay the whole damages, but obviously I won't get the whole gains, so I am going to leave." American leaves. Chrysler then says the same thing to itself. Ford says the same thing to itself, and Ford leaves. Only General Motors now is in the room, and there is no conspiracy left and no contribution problem with only one firm.

It seems to me that the argument that plaintiffs will target damages on a given group of defendants leads, in a logical process to the conclusion that there will soon not be any antitrust conspiracy.

Mr. Cannon. How about the question of overdeterrence on small business? I do not think you precisely addressed that.

Mr. Easterbrook. It is certainly true, to the extent that the antitrust law is rather arbitrary and erratic—that is, that there is a substantial gray zone—that the sifting-out process I have just described, by which firms drop out of an agreement successively, also would cause them to drop out of lawful, valid, and efficient business practices. I think there is no doubt whatsoever that that would happen, and that disturbs me considerably.

The hard question for the Senate is whether the deterrence of desirable practices increases or decreases as a result of no contribution. The real concern is that when antitrust courts draw a meandering line between the lawful and the unlawful, people who are worried about their liability have to steer far clear of the line.

Because we would like people in most cases to come right up to the line—to charge the lowest prices they can, for example, without getting hit with a predatory pricing suit—ambiguity in the antitrust law is a source of great concern.

I do not think, however, that no contribution makes the problem any worse. The problem comes from the ambiguity itself and not from the way in which the damages are apportioned.

Mr. Cannon. Professor, in your written statement you compare the fairness of the no contribution rule with that of a lottery—that is, that everyone knows the risk ahead of time and that they are being treated fairly whatever the outcome.

Leaving aside for the moment the question of whether in those antitrust actions the companies involved could accurately assess the risk, do you not think this approach is fundamentally contrary to the legal concept that the punishment should fit the crime, which views fairness not as an equal treatment but equitable treatment?

Mr. Easterbrook. I suppose I am not sure about the difference between equal treatment and equitable treatment. In the lottery example I gave, the treatment of somebody who participates in a lottery and loses is of course unequal, but everybody thinks it to be perfectly equitable.

The reason I thought it appropriate to analogize antitrust cases to lotteries is that it is well known that there are substantial sources of uncertainty, and anybody who engages in any business practice is taking a large number of risks, the nature of which he will think about either explicitly or implicitly.

He takes a risk that the consumer will not want to buy his products at the price he states. Even if he violates the antitrust law, he is taking a risk that he will be discovered, and so on.

I do not want to burden all antitrust offenders, who often are caught up in the meanderings of the law, with the uniform label "felons," but one can compare antitrust offenses in a sense with bank robberies. A bank robber who violates that particular law is attempting to avoid detection, and not all bank robbers will be detected. One thing we do with the bank robbers that we do catch is impose on them rather stiff penalties to make up for the fact that there are lots of people who have not been caught, and that process of multiplication is what underlies treble damages in the antitrust laws.

We all know that there are a lot of violators, a lot of people who fix prices, who are never caught and that those who are caught are penalized treble damages to make up for the fact that others are not. Because antitrust law is based on that notion of risk taking in multiplication of penalties, it does not strike me as unusual to apply it here.

Mr. CANNON. Professor, you say that people are penalized treble damages make up for the people who are not caught?

Mr. EASTERBROOK. This is the best common way of thinking about why damages in antitrust cases are treble rather than single, while damages in almost all other Federal cases—in a securities case, for example, if I defraud somebody, I have to pay over my profits or make up his damages once—are not trebled.

A lot of antitrust violations are concealable, so that when the plaintiff actually catches somebody, and he has paid overcharges to many defendants whom he has never caught, he is able to collect a remedy that roughly reflects his losses over the run of antitrust cases and roughly imposes deterrence on those defendants.

That problem of multiplying recoveries for concealable offenses suggests one more difficulty with applying contribution across the board. Not all antitrust violations are concealable. Tie-ins, for example, and vertical restraints, vertical mergers, and the like are not concealable; they are detected at first glance.

There is something odd, I suppose, in my saying that treble damages are to make up for concealability when there are many nonconcealable offenses for which there are treble damages. One suggestion, made not only by academics but also by many practitioners, is that the available damages for nonconcealable offenses be reduced.

One function of contribution legislation, I have suggested in my prepared statement, is effectively to reduce the damages for the nonconcealable offenses, and that is one argument why contribution might be quite desirable for nonconcealable offenses.

Ms. **Tiffany**. Professor Easterbrook, not to belabor this fairness point too much, in your analogy to the bank robber, for example, when the penalties are fixed for bank robbery they are fixed as the appropriate remedy for the violation committed—namely, bank robbery.

I do not think it would be acceptable under our legal system to, say, have a lottery that all bank robbers caught in any one year pick a straw and one of them gets the death penalty and the rest go free.

There is this concept that whatever penalty you impose, even if you knew the odds ahead of time, you still have to have some correlation between the violation and the penalty.

Mr. **Easterbrook**. But in fact we do have a lottery. That is, not all bank robbers will be caught, and of the bank robbers that are caught, the prosecutor will prosecute some and not others.

Bank robbery is a serious offense, and one would expect that a large proportion of all those caught will be prosecuted, but a less serious offense, one involving smaller numbers, would be, for example, a theft by a postal clerk.

There was a very nice study last year showing that U.S. attorneys, of all those cases brought to them in which they can achieve convictions, prosecute about 4 percent of cases involving theft of U.S. property, and they let the other 96 percent go. [Frase, "The Decision To File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion," 47 v. Chi. L. Rev. 246 (1980).]

There have been many arguments made in the criminal law that U.S. attorneys, like their counterparts in Germany, should be compelled to prosecute all, so that there would not be inequitable or unequal treatment ex post the offense. Yet it is as firmly fixed as one can imagine in our Anglo-American legal tradition that there is no compulsory prosecution of those offenders.

Ms. **Tiffany**. But this is a matter of prosecutorial discretion, and in fixing the penalty for a postal theft you do not put in the death penalty because only 1 out of 10 is going to get caught.

It seems to me that there has to be some correlation between the penalty you are imposing on people in an antitrust action and the activity that they have engaged in, in order to have this concept of fairness, rather than merely looking beforehand at the percentage possibility of being caught times the——

Mr. **Easterbrook**. I would not doubt for a second that the penalty imposed has to be measured in relation to the harm done and that the death penalty would be highly inappropriate as the penalty for two groceries getting together and fixing the price of bread on one block in Washington, D.C. But antitrust penalties are indeed fixed by reference to the overcharge so this proportionality is ensured.

Ms. **Tiffany**. But then the argument would follow that, if it is fair to have the damages allocated to the responsibility, then contribution is a more fair rule because it results in a greater allocation of damages to responsibility.

Mr. **Easterbrook**. It brings me back to my first point. If the question is, what has the American legal tradition been? The American legal tradition has been that there is no sharing among joint tort-feasors.

If the question is, is this fair or not? The answer depends on whether you inquire before the offense when people are considering whether to fix prices, in which event their expected shares are equal, or whether you inquire ex post. My submission has been that the appropriate time is the same for any risky activity. That is, you ask when people are going in with their eyes open and taking risks.

Ms. TIFFANY. I think I understand your position.

Mr. CANNON. Professor, referring back to your written statement and your article, why do you believe that recoveries in antitrust cases are small relative to the profitability of antitrust violations, particularly in light of treble damages and the availability of attorney's fees where, in the normal civil suit, only single damages are available and each side bears their own fees?

Mr. EASTERBROOK. It has been very difficult for those who have attempted to do so to calculate the ratio between recoveries and violations in antitrust cases, if only because, when many offenses are concealable, it is very difficult to figure out where the violations occur.

Those few studies that have been done suggest that the amount of price fixing in our economy is relatively large compared with the total recoveries.

People come up with figures—losses to price fixing—in the billions of dollars per year all across the economy. Some calculations have been in the tens of billions of dollars per year.

On the other hand, if one goes to court records and tries to tote up the amount of money plaintiffs are in fact recovering in antitrust cases, one finds that the amounts are quite small compared with those calculations of total losses. [Compare Posner, "The Social Costs of Monopoly and Regulation," 83 J. Pol. Econ. 807 (1975), with Posner, "A Statistical Study of Antitrust Enforcement, 13 J. Law & Econ. 365 (1970).]

That is why I say the recoveries in price-fixing cases are not adequate. The amount of profit from price fixing appears to be much larger than plaintiffs' recoveries.

Mr. CANNON. One more question, Professor, and then Senator Thurmond will have some to submit to you in writing. Under the contribution and claim reduction rule being considered by this committee, would not the normal pressures of risk aversion and cost of litigation tend to encourage settlement in antitrust cases, just as they do in any civil case?

Mr. EASTERBROOK. I think they would.

Mr. CANNON. A short answer. Thank you very much.

Mr. EASTERBROOK. Thank you.

Mr. CANNON. The hearing is recessed, subject to the call of the Chair.

[Whereupon, at 12:15 p.m., the hearing was recessed, subject to the call of the Chair.]

[Prepared statement of Frank H. Easterbrook follows:]

December 7, 1981

STATEMENT OF FRANK H. EASTERBROOK BEFORE THE SENATE COMMITTEE ON THE JUDICIARY CONCERNING CONTRIBUTION AMONG ANTITRUST DEFENDANTS

Mr. Chairman: I welcome the opportunity to provide, at the request of the Committee, my views concerning proposals to amend the antitrust laws to permit contribution among defendants. My testimony today summarizes and applies the arguments first presented in Frank H. Easterbrook, William M. Landes & Richard A. Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Economics 331 (1980). I want to emphasize, however, that I speak only for myself, not (necessarily) for Professor Landes or Judge Posner.

I conclude, for reasons I will explain, that legislation is not necessary; indeed, any legislation concerning contribution will increase the costs of antitrust litigation and reduce, to an unknown degree, the utility of the antitrust laws in deterring wrongdoers. If the committee should conclude, nonetheless, that legislation is advisable, it should adopt the approach proposed by Assistant Attorney General Baxter and establish a system of claim reduction. The claim reduction approach is preferable because it has the least adverse effect on settlement. It should not, however, be applied to price fixing cartels. I do not take a position on whether contribution legislation should apply to pending cases.

My testimony has four parts. I first discuss the argument that contribution is necessary to ensure fair treatment of defendants. Second, I show that contribution and no-contribution are equally effective in deterring offenses, in the absence of any effects on the rate at which disputes are settled. The third part of my testimony discusses the effects of contribution on settlement, and the fourth considers the different ways in which contribution may be achieved.

I

The usual argument in support of contribution is that the existing system of joint and several liability is unfair. There is inequity, the argument runs, in allowing one defendant to settle for a small sum while others face the prospect of staggering damages awards.

This argument contains the smuggled assumption that antitrust defendants are entitled to "fair treatment," which is far from clear. Antitrust offenses are crimes, and intentional crimes at that. No one violates the antitrust laws by accident; even if a firm does not know for sure that a given course of conduct is unlawful, it can learn the risks by consulting competent counsel. As Justice Holmes pointed out long ago, in sustaining a statute against the charge that it was unconstitutionally vague: "Whenever the law draws a line there will be cases very near to each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the law to make him take the risk." United States v. Wurzbach, 280 U.S. 396, 399 (1930).[1]

The common law rule of no contribution arose, in substantial measure, from the revulsion of courts to claims by criminals for equal treatment. For hundreds of years common law systems have let the burden of crimes and intentional torts lie where it falls among wrongdoers, modifying the rule only for cases of negligence. If we take seriously the proposition that antitrust offenses are felonies, there is no compelling argument for treating offenders equally. It is costly for the judiciary to administer a system of equal treatment, yet the beneficiaries of these costs are the wrongdoers, not the innocents.

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[1] Justice Holmes then cited Nash v. United States, 229 U.S. 373, 377 (1913), in which the Court had rejected a vagueness challenge to the Sherman Act, saying, again in an opinion by Holmes: "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If the judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

Contribution would increase the real costs of having an antitrust system without enabling society to obtain any real benefits. One can scan the entire corpus of the criminal law without finding a principle of equal or fair treatment of offenders.[2] Why should antitrust law be different?

It is hard, though, to be against "fairness" — particularly when the path of the law has been as unpredictable as that of antitrust — and I do not place my submission today on the proposition that fairness is always irrelevant. It is enough to say that the no contribution rule is as fair as any other rule.

Businesses exist to take risks. There are no sure winners. Every new product, every new market, every new price is a gamble. Business practices in the grey zone of antitrust are just another gamble. Perhaps there will be no challenge; perhaps if the practice is challenged it will be sustained; perhaps, if the practice is not to be sustained, the firm may arrange an advantageous settlement of the litigation. In a world of risk-taking, the cost to the firm of antitrust liability is its actuarial value: the likelihood that a plaintiff will prevail, multiplied by the amount the plaintiff will recover if he wins.

A game of risk-taking is fair so long as the players are not defrauded about the odds. Fairness is equal treatment given the odds, and the right time to measure "equality" is before the game is played. It is necessary, in other words, to distinguish ex ante *equity* from ex post *inequality*.

A person who loses a lottery is treated unequally ex post in comparison to the winner, but ex ante — when he bought the ticket — there was no inequity. This is no less true in antitrust cases. Suppose, for example, two firms are pursuing a course of conduct that has antitrust risks. There is a 50% chance that someone will be held liable, and under no contribution there is a 50% chance that either of the two will be required to pay the whole sum. If the damages are $100, each firm has an expected liability of $25 — the $100 damages, times the .5 chance of successful suit, times the .5 chance that it will be selected as the defendant. The expected liability of the firms is the same; there is no unfairness or inequity no matter what happens later on.

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[2] For example, one defendant may be convicted and another acquitted, even though the same evidence applies to both. *Standefer v. United States*, 447 U.S. 10 (1980); *Hamling v. United States*, 418 U.S. 476, 492 (1974). The prosecutor may select one offender for prosecution while letting another go, so long as the selection criteria are not invidious. *Oyler v. Boles*, 368 U.S. 448 (1962); *United States v. Nixon*, 418 U.S. 683, 693 (1974). Administrative agencies have the same discretion in enforcing trade regulation rules. *FTC v. Universal-Rundle Co.*, 387 U.S. 244 (1967).

Moreover, many firms are "repeat players," so that antitrust risks turn out to be apportioned equally both ex ante and ex post. Even when the firms are not repeat players, the firms' shareholders may be. Most shareholdings today are in diversified portfolios.[3] Investment managers, pension trustees, and individual investors (through mutual funds) hold equity positions in firms throughout the economy. These diversified shareholders do not care how damages in antitrust cases are apportioned. No matter which defendant pays, the sum comes out of the value of the portfolio. The diversified shareholder prefers to have damages collected in a way that has the least cost for all firms put together. The least-cost collection device is no contribution, because it avoids wrangling about which firm is to pay how much.

In the ex ante perspective it would not be unfair even if one group, say small firms, were called on to pay the damages disproportionately often. If the firms knew the risks in advance and anticipated disproportionately large liability, they would not take the antitrust risks except in exchange for a disproportionately large share of the gains. There is no reason to think that any group of firms would participate on inferior gain-to-liability terms.

At all events, there is no evidence that plaintiffs pick on any group of defendants. The usual practice is to sue everyone in sight and to settle with whichever defendants line up to do so; there is no discernable bias in the pattern of suits and settlements.

II

A second argument frequently heard is that contribution is necessary to achieve deterrence of offenses. Several judges have argued, for example, that the a firm will be deterred if and only if it pays its share of the damages. An offender who pays nothing, the argument goes, is not deterred.

Again, this ex post perspective is inappropriate. Once a violation has been detected it is too late to deter the particular offense. Deterrence looks to the future. The rule for apportioning damages is important only to the extent it creates expectations about liability for future offenses.

If there are two firms, and one pays all of the damages in a given case, it does not follow that the other will feel free to violate the antitrust laws in the future. Each will ask: What damages am I likely to pay? The answer depends on the expected total damages and the probability that each will be required to pay. As before, if the total damages are $100, there is a 50% chance that a court will award the damages, and each firm expects to be called on half of the time, each firm has an expected liability of $25. The fact that one firm pays nothing in a particular case is irrelevant.

It would not make a difference, indeed, even if one firm expected never to be called on to pay. Suppose, to take an extreme example, the rule required the defendant with the smallest market share to pay the total damages in every case. This seems to guarantee that larger firms go undeterred; their expected damages are zero. But because it always takes more than one firm to have a conspiracy in restraint of trade — and there is no contribution problem for monopolization cases — the rule still produces adequate deterrence.[4] If one firm knows that it will pay less than its share, someone else

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[3] John H. Langbein & Richard A. Posner, Social Investing and the Law of Trusts, 79 Mich. L. Rev. 72, 77-83 (1980), contains a lucid description of the theory and practice of diversification.

[4] I assume here, and throughout my testimony, that the damages award is set high
- Cont'd -

must pay more. The firm burdened with the extra payment will drop out, and the conspiracy will collapse.

Take the automobile industry as an example. If General Motors, Ford, Chrysler, and American Motors contemplate a price-fixing conspiracy, American will know that it must pay all of the damages. American will drop out rather than assume this liability. Then Chrysler will be the smallest, and it too will drop out rather than be exposed to the full damages. That leaves Ford and GM. Ford will quit; so much for the conspiracy.

The rule of no contribution thus brings to bear on each potential conspirator the same ex ante liability as the rule of contribution. The deterrent force of the rules is identical, _if_ there are no offsetting forces. The qualification is important. I discuss immediately below the effects of no contribution on settlement; no contribution encourages settlement, and for higher sums. This increases deterrence. Moreover, the no contribution rule makes life easier for plaintiffs, who can collect damages from whichever source is most convenient. By reducing the costs of litigation, no contribution makes suit more likely and thus increases deterrence.

There is, however, an argument that the no contribution rule reduces deterrence compared with contribution. It appears in A. Mitchell Polinsky & Steven Shavell, _Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis_, 33 Stan. L. Rev. 447, 453-55 (1981), and proceeds as follows: The antitrust law deters only because of its effect on the managers of firms. These managers make the critical decisions. Yet there is a maximum penalty that can be brought to bear on managers, a maximum fixed by the greatest possible reduction in their future salary and prospects. Because that maximum effective penalty is likely to be a great deal less than the gains from antitrust violations, it is necessary to penalize the managers as often as possible in

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enough to achieve deterrence, that is, that it exceeds the gains available from the offense divided by the probability of apprehension. If the damages award is not set large enough, it will not deter no matter how it is apportioned. See Frank H. Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 318-31 (1981), for a discussion of optimal damages in antitrust cases.

order to achieve deterrence. The rule of contribution serves the function of increasing the frequency of penalization and thus deters better.

This argument is plausible but, I think, incorrect. It assumes that managers suffer a reduction in their career prospects only when their firms actually pay something in damages. This is a questionable assumption. An airline pilot who buzzed the Empire State Building would suffer a reduction in career prospects even if he did not kill his passengers; a manager is apt to suffer, too, when he exposes his firm to excessive risks, even if the firm is not called on to pay damages. Moreover, although a manager does not pay the full penalty when his conduct brings liability down on his firm, he also does not receive the full benefits when a profitable violation goes unpunished. In both cases, the lion's share of the benefits and costs are felt by the firm's owners. All that is necessary to deterrence is that the manager's perceived share of the costs be as great as his perceived share of the gains, and there is no adequate reason to think that contribution is necessary to achieve this equivalence.[5]

III

The effect of the no contribution rule on settlement is striking. Let us assume, as before, that there is a 50% chance that the defendants will be held liable and that total damages are $100. The expected liability of each of two firms is $25. Either defendant thus would offer up to $25 to settle the case, in order to save the costs of litigation.

But although the plaintiff would accept the offer — he always prefers a dollar with certainty to the 50% chance of getting the same dollar at trial — the non-settling defendant becomes worse off. If one firm settles, the other is sure to be called on to pay the damages at trial. If this firm loses, it will be required to pay \$75 (the full damages, less the \$25 the plaintiff already received in the settlement). Its expected liability is \$37.50 (\$75 times the .5 chance of losing at trial).

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[5] Professors Polinsky and Shavell also argue that the no contribution rule augments deterrence because it entails greater risks for the firms than a contribution rule. Id. at 452-53. This is so if shareholders are risk averse, but I doubt that they are. Because shareholders can hold positions in many firms, they are effectively indifferent to the risk that one of their firms will be called on to pay the whole sum rather than the sum being apportioned among many different firms.

The defendants would compete to settle, because the first one in line obtains the advantage. At a settlement price of \$33.33, each defendant will be indifferent between settlement and trial. The non-settling defendant has a 50% chance of paying the remaining \$66.67. But now the plaintiff collects \$66.66 rather than \$50. And if some defendant foolishly holds out on settlement, its position will deteriorate.[6]

This is the economic explanation for the much-discussed "whipsaw effect" of settlement under the no contribution rule. Early settlers are better off than later settlers. The total collected by the plaintiff increases. As the number of defendants goes up, the total settlement becomes higher, perhaps to an unjustifiably high level.

The defendants can combat this whipsaw effect by agreeing that none will settle unless all settle, but the plaintiff can undermine this settlement cartel by offering a bargain settlement to one defendant. The offer might be, say, \$10 instead of the actuarial liability of \$25 under the defendants' agreement. Many defendants would be sorely tempted, and the settlement arrangement would break down. (More commonly the defendants are unable to reach an agreement in the first place.)

Under a contribution rule, however, the effect runs in reverse. There is a strong disincentive to settle. If one firm settles for \$25, and the other goes to trial, the latter has the lower expected liability. The defendant standing trial expects to lose half of the time, and when it loses it will pay only \$50. (The award of \$100 will be reduced to \$75 to reflect the plaintiff's earlier collection, and then the defendant that stood trial could collect \$25 of this in contribution in order to equalize the payments.) Under a contribution rule, then, the defendant that refuses to settle has the actuarially "right" expected liability of $25.

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[6] It is sometimes argued that this process causes the less culpable (fringe) defendants to do worse than the more culpable. The argument is incorrect; in fact settlements and holdouts under no contribution magnify the payments of the more relative to the less culpable. See 23 J. Law & Economics at 368-70.

The firm that settled, however, has paid $25 no matter what, and it stands to pay another $25 (to its codefendant) half of the time. This firm thus has an expected liability of $37.50 as a result of the settlement. It would not voluntarily settle; it can do better by going to trial. Under contribution there is a competition to be last to settle, paralleling the competition under no contribution to be first.

Yet trials in antitrust cases are exorbitantly costly. Settlement saves the costs of these trials and thus enhances the cost-effectiveness of the antitrust laws. A contribution rule would reduce the effectiveness of the laws.

IV

The deterrence of settlement under contribution comes from the fact that defendants that stand trial can collect from defendants that do not. The bills under consideration by this Committee prohibit such collections, and thus they remove that effect. Moreover, the whipsaw effect of settlement comes from the fact that those who stand trial under no contribution are liable to pay more than those who settle. The claim reduction provisions of the bills before the committee overcome that effect, too.

A statute such as the one recommended by Assistant Attorney General Baxter is neutral with respect to settlement, neither favoring nor discouraging it. It is neutral with respect to deterrence, because the total damages under a claim reduction approach should be the same as the total damages in the event every defendant stood trial. It is, in these senses, a welcome proposal.

These provisions are not costless, however. As I have pointed out, the contribution and claim reduction combination of the proposed legislation reduces the deterrent force of the antitrust laws compared to that under no contribution; the whipsaw effect of settlement under no contriubution increases plaintiffs' recoveries and supplies additional deterrence. The important question is whether it supplies too much deterrence. Unless we know whether the structure of antitrust penalties supplies too much, too little, or just the right amount without respect to the contribution rules, we cannot know whether a change to contribution is for the better or for the worse. I strongly suspect, although I cannot prove, that recoveries often are too small relative to the profitability of antitrust violations, and I therefore suspect that a change to a contribution and claim reduction system would be a change for the worse.

Many violations (such as price fixing) are concealable and hard to prove in court even when detected. There is probably not enough deterrence of such violations. On the other hand, other events (such as mergers, tie-ins, and exclusive dealing arrangements) are easily detected, and the award of treble damages in such cases overdeters. It would perhaps be tidier to change the rules of antitrust damages to reflect these differences, awarding more than treble damages in price fixing cases and less in other cases. It is also possible, though, to affect the expected value of damages by changing the contribution rules. The analysis I have offered here suggests that no contribution might be retained for price fixing cases, while contribution and claim reduction are adopted for other cases. The suggestion of the Department of Justice that all violations be treated identically, apparently out of concern for symmetry, is simply not supportable. Price-fixing and other cases are not identical; there is no reason to treat them as such for purposes of damages or the ancillary damages devices such as contribution.[7]

The argument for contribution in any antitrust cases must rest on the belief that the gains of contribution in reducing the whipsaw effect of settlement are worth the costs. The costs are unlikely to be small.

First, there will be costs in litigating suits that do not now exist. Subsection (b) of the bill proposed by the Assistant Attorney General would allow any person who pays a sum of money to bring an independent suit against any other person who would have been liable. So, for example, a firm that settles could bring suit against other firms to recover part of the settlement — even though the settlement left the plaintiff contented. Under existing rules the settlement would end the litigation. Under the proposed legislation the settlement would just start the litigation, requiring courts to adjudicate all of the complex issues that previously have been avoided. We could expect to see a good deal more costly antitrust litigation, but none of these costs would increase by one iota the utility of the antitrust laws in protecting consumers.

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[7] Moreover, because price fixing is the paradigm intentional, criminal violation of the antitrust laws, the "fairness" arguments for contribution are weakest here.

It is fair to conclude that the costs of such suits would be substantial. The willingness of parties to litigate depends on the stakes of the case. The higher the stakes, the more the parties will invest. In the limiting case, they will invest as much as the value of the case in order to increase (or reduce) their recoveries (or liabilities). Antitrust cases involve exceptionally high stakes, and therefore it is likely that the litigation concerning contribution would be protracted and costly.

Second, contribution and claim reduction would complicate existing suits. The Assistant Attorney General's proposal calls for courts to reduce claims, or require contribution, according to "relative magnitude . . . of sales" in price fixing cases and according to "relative responsibility" in other cases. The latter standard has no apparent meaning, and the parties could spend great sums arguing nice points, all without assisting in the application of such a nebulous approach. The former standard is intelligible, but again the costs of litigation would be considerable.

In order to apportion liability, it would be necessary to determine a relevant market and calculate the market shares of each firm. This is no mean feat; the National Commission for the Reform of Antitrust Laws and Procedures concluded in 1979 (Report Vol. II, at 95-96) that in complex cases market determination takes some 55% of trial time, averaging several months of trial per case. Market definition is complex because there is no "right" market. A market definition is just a proxy for power over price, and in any given case there may be several equally plausible market definitions.[8] When no one definition is "right," yet tens of millions of dollars may turn on the choice, there is a substantial potential for protracted litigation. The costs of market definition usually are avoided in cases tried today, because market definitions and proof of market power are irrelevant under the per se rule against price fixing. The need to compute market shares would complicate cases that now are relatively simple.

It would be necessary, moreover, to compute market shares not only for the defendants but also for every firm that might have been (or in the future might be) named. Antitrust cases would entail efforts to find all persons that might conceivably be found to be liable, and to compute the market shares (and liability) of each, in order to determine contribution and claim reduction. This determination would involve not only nice questions of culpability but also subtle and difficult questions concerning the scope of any one unlawful agreement. Presumably contribution would cover only the adherents to a single unlawful plan. As a result, in industries (such as wood and paper products) in which multiple suits are pending, it would become necessary to have the courts determine where one agreement ends and another begins. Such proceedings could be exceptionally difficult and costly.

Third, a contribution and claim reduction rule would give rise to costly adaptations. Plaintiffs could strike side deals with some firms in an effort to evade the contribution rules. For example, a plaintiff could offer one firm a settlement-like deal — say, a promise not to collect part of the judgment — in exchange for payment of less than that firm's contribution share. Such side deals would reproduce the whipsaw effect of the no contribution rule. Or perhaps the plaintiff and one firm would agree to say that the payment was in settlement of a dispute other than the one before the antitrust court — perhaps a contract case, or a different antitrust complaint. It would be very difficult to pierce these arrangements and determine what "really" has been paid in settlement, yet unless the arrangements were pierced the process of claim reduction against non-settling defendants would fall apart. Similar problems have plagued state statutes on contribution (see 23 J. Law & Economics at 366-67); the problems would be magnified many-fold in antitrust cases, where the stakes are higher and the parties (and thus the number of possible side deals) more numerous.

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[8] See William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981), for a description of the function of market definition.

In summary: Contribution and claim reduction would complicate antitrust cases and greatly increase the costs of litigation. The costs would purchase no visible benefits, save the elimination of the additional payments attributable to the settlement whipsaw effect. And even this elimination is of doubtful benefit; if antitrust penalties for concealable offenses are too low, as I believe, contribution and claim reduction would reduce the effectiveness of the antitrust laws ever further. The probable costs of contribution and claim reduction thus exceed any probable benefits.

THE ANTITRUST EQUAL ENFORCEMENT ACT

WEDNESDAY, FEBRUARY 10, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Hatch, East, Grassley, Specter, Byrd, Baucus, and Heflin.

Also present: Senator Helms.

Staff present: Peter Chumbris, antitrust counsel; W. Stephen Cannon, antitrust counsel; and Marcy J. K. Tiffany, antitrust economist and counsel.

STATEMENT BY HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. The hearing will come to order. Today the committee continues its consideration of S. 995, the Antitrust Equal Enforcement Act of 1981. If enacted, this bill would establish a right of contribution and claim reduction, all for the purpose of assuring the fair apportionment of antitrust damages.

The specific purpose of this hearing today is to discuss whether S. 995 should be amended in some fashion to apply to pending cases. Currently section (e) of the bill provides that it shall apply to cases filed after the date of enactment.

We are fortunate to have with us a wide variety of distinguished witnesses to discuss this particular aspect of this legislation. Time will be equally divided between the proponents and opponents of applying S. 995 to pending cases. In addition, we will leave the record open for 1 week. I believe we have about an hour and a half allotted to each side.

Our first witness is Hon. Griffin Bell, the former Attorney General of the United States.

Judge Bell, we are delighted to have you with us today along with so many other distinguished guests. You may now proceed.

STATEMENT OF HON. GRIFFIN B. BELL, LAW FIRM OF KING & SPALDING, ATLANTA, GA.

Mr. BELL. Thank you, Mr. Chairman, for the opportunity to make a case on behalf of the claim reduction part of S. 995 to pending cases.

I want to do two things. I want to emphasize what we expect to prove in our case and also to present our other witnesses and to outline the format we expect to follow with the approval of the Chairman.

As the Chairman knows, S. 995 addresses a national problem that has come about over a period of some 60 years and was caused by a court decision imposing joint and several liability in the treble damages provision of the antitrust laws. Then in 1966 when the modern class action came into being these three laws—one is statute, one is a court rule, and class action is a joint device of the courts and Congress—came to have a synergistic effect and to really seriously interfere with the constitutional right to go to trial in the hope of establishing innocence once you have been charged.

S. 995 has two parts. One part is contribution. It creates a new cause of action. It would be of limited use. Once in a while a plaintiff might not for some reason, arbitrarily or otherwise, sue all of the participants in a relevant market. He may select a few of the people in the market rather than all. In that event, some of the people who are selected would want to have a right to go against those who were not selected.

The principal part of S. 995 that is needed to cure what I call a great national problem is claim reduction. It is a new way of computing damages. It limits the damages of any one company on the market to treble damages based on that company's share of the market. This puts a cap on damages in the amount that Congress itself set, which is treble damages. The way it is now it might be forty-fold, fifty-fold, or hundred-fold damages.

Mr. Chairman, you asked me last year to attempt to arrange a compromise in the business community. It would not be possible to ever arrange a compromise with the plaintiffs, particularly the plaintiffs' lawyers. However, you had hoped that somehow the business community could get together and come up with some compromise of this section (e) that now says that the provisions of this act—that means contribution and claim reduction—shall not apply in a pending case.

I have done my best to work out a compromise. Others have worked hard also. The chairman and other members of the committee have worked hard to find a compromise. The compromise that we favor is to leave the bill as it is with respect to contribution. Contribution would not be applied in pending cases, but claim reduction would be.

Claim reduction is simply a new way of computing damages. We think it is eminently fair to apply claim reduction in pending cases. We think by doing this fairness will be restored to the law. No law is effective that is unfair.

The deterrent effect of the law would be restored. There is no deterrent effect now when a pricefixer can settle in case after case for 5 or 10 cents on the dollar. Someone is always left at the end who has to make up for this bargain that this pricefixer has obtained. That would be ended under our approach to the matter.

Our approach would also preserve any settlements that have been made. I think to show that we are on the right track, most every company that was objecting has now become neutral or has switched sides. There is a handful of what I call dissidents who are left. They are here today and the committee will have a chance to hear from them, but there are not many left. Most everybody has switched or has become neutral.

In support of our position we will have Hon. Charles Renfrew, former Deputy Attorney General, for many years a U.S. district judge, and now a partner in the San Francisco law firm of Pillsbury, Madison & Sutro.

We will have Senator Sam Ervin here also. We brought Senator Ervin here because of his acknowledged expertise on constitutional law. It has been said from time to time that there is something about our position that is unconstitutional. Therefore, we brought somebody here who understands the Constitution to answer those contentions.

The CHAIRMAN. Incidentally, I see Senator Ervin back there. I have never known a more able lawyer with whom I have served in the Senate than Senator Sam Ervin. If he would care to come up here to the desk, we would be glad to have him join us.

Mr. ERVIN. Thank you, Mr. Chairman, but I will stay down here.

The CHAIRMAN. All right. You may proceed.

Mr. BELL. Thank you, Mr. Chairman.

Our third witness will be Marshall Hahn, who is president of Georgia-Pacific Corp., former president of Virginia Polytechnic Institute, a physicist, now a businessman, and a victim of the present system of law.

Then we will put on a panel of businessmen and lawyers who will be representing small companies. They will be on together for 2 to 3 minutes each. They will be Mr. Alec Brindle, president of Wards Cove Packing Co., a salmon packer in Seattle; Charles H. Spain, Jr., general counsel of the Medusa Corp. of Cleveland, Ohio; and Richard Dashefsky of the firm of Gibson, Dunn & Crutcher, who will appear on behalf of the Gleason Corp., National Gypsum Co., and a company that he will identify as company X. He will describe the company, but they do not wish their name used in the hearing. Of course, that does not mean that we would not give the name to the chairman or to any other member of the committee privately.

In that group of four will also be a well-known victim, Mr. Donald Kress, whose family owns Green Bay Packaging. They were caught in one of these cases and almost had to give up the company assets to get out of the claim because there were others who settled and left them in the case.

We have written statements which have already been filed by the Mead Corp., Vulcan Materials, and Westvaco. They have representatives here on whom the committee can call to answer questions if the committee should so desire. They are Mr. McSwiney, head of Mead; Mr. Scrivener, general counsel of Vulcan Materials; and Tom Long, vice president and general counsel of Westvaco.

In addition to that, we have a written statement that will be filed on behalf of Anheuser-Busch and the Giant Portland Cement Co. of Columbia, S.C.

Mr. Chairman, our witnesses will come on in succession so we do not lose any of our valued time. I would like to reserve 5 minutes of our hour and a half for rebuttal after we have heard from those who are opposing us.

Senator Byrd is here. I know he has a limited amount of time. We are going to put on Judge Renfrew now. Immediately following Judge Renfrew will be Mr. Hahn, the president of Georgia-Pacific. Then Senator Ervin will come on with his testimony and statement on the constitutionality question.

The CHAIRMAN. I have one question, if I could ask that, and then we will proceed in any order that you wish.

I read a memorandum written by you dated October 7, 1981. Your memorandum makes a point that the Supreme Court in the *Texas Industries* case decided that under both statutory and common law there is no right to contribution in antitrust cases. However, you go on to contend that there is a common law right to claim reduction and that Texas Industries did not disturb or change this right.

If you are correct, it seems to me that a simple amendment which grandfathers into the bill any right to claim reduction which may now exist would satisfy you. Such an amendment would give plaintiffs, settling defendants, nonsettling defendants, and anyone else who may be interested the right to present their arguments in court for or against the existence of the right to claim reduction in antitrust cases.

Before you answer my question, it should be mentioned that I have also read a memorandum from Mr. Stewart Eizenstat, counsel to International Paper Co. He disagrees with the conclusions in your memorandum.

I ask you what would be your position on such an amendment?

Mr. BELL. My position is this. We have this issue pending in two courts now. We hope to get a ruling. That would be from an authority somewhat higher than Mr. Eizenstat. That would solve that dispute if there is a dispute.

Second, while we would be glad to have such an amendment—it would be better than nothing—it might in a way inferentially undercut the right we now have because somebody might say, "Why would Congress deal with this by creating the right to claim reduction or recognize that there might be a right if there already is a right?"

This is an evolving right. It is something we have to win in court. If we cannot get anything else, I suppose we would be glad to receive it, but we are hoping for something more. We are hoping to get the right to contribution generally applied to pending cases. If so, then we would not have to worry about this question. I appreciate the chairman's concern.

The CHAIRMAN. I believe the next witness is Judge Renfrew?

Mr. BELL. Yes, sir.

[The prepared statement of Hon. Griffin B. Bell follows:]

STATEMENT

OF

GRIFFIN B. BELL

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for permitting me to appear this morning to make remarks in support of legislation to provide rights of claim reduction and contribution in antitrust cases. As I testified last April, this legislation is urgently needed to restore fairness to the antitrust remedial scheme. Antitrust remedies have become severly distorted--so much so that in many instances the antitrust laws are being used as an anti-competitive device directly contrary to the basic purpose of those laws.

Last April I commented that I would suggest only one amendment to S.995, to make it applicable to pending cases. Following that time, some raised questions concerning whether that could be done fairly and you asked me, Mr. Chairman, to attempt to resolve these questions. From that day until the present time, I have devoted a great deal of effort and time to meeting with each of the companies that have been interested in this legislation. We began last May with meetings in New York and in Washington that brought together all the members of the forest products industry that were concerned, along with several other industries' representatives. Since that time I have met with companies interested in this matter on many occasions. Many members of this Committee have generously given of their time and their good offices in the effort to draft language to restore fairness and effectiveness to antitrust remedies, while protecting the rights of all concerned.

I am very pleased to report that the proposed compromise amendment has achieved substantial consensus. Only a handful of companies remain opposed to the proposed amendment language, a copy of which is attached as Exhibit A.

A number of companies that formerly were opposed have expressed their support for this proposed language. A number have said that they want the legislation and are neutral as to whether this amendment is adopted--that is, they would support the legislation with or without the amendment. The few companies that we have been able to find that remain opposed do so without reasonable basis.

The language that has achieved consensus completely protects all concerned. First, plaintiffs are protected because the proposed amendment incorporates the manifest injustice standard that has been developed in the case law. Thus, the bill cannot be applied in any pending case if manifest injustice would result and, second, subject to the manifest injustice proviso, the only remedy available to litigating defendants under this proposal would be the claim reduction (or "carve-out") formula of S.995. Contribution rights would be available only in cases commenced after the date of enactment. Settlements would be absolutely safeguarded. This specific language, together with the case law which provides uniformly that settlements will not be affected by subsequently enacted legislation, gives complete protection to those who have previously signed settlement agreements in all pending cases. As a result, a number of the companies that previously had opposed the application of this legislation to pending cases for fear their existing settlements might be affected have changed their position in light of this proposal.

The principal argument against application in pending cases has been laid to rest by the Fifth Circuit Court of Appeals. On October 29, 1981, the Fifth Circuit approved all of the 24 settlements before the Court in the Corrugated Container Antitrust Litigation, MDL No. 310. It also approved the plan of distribution of the sums collected by plaintiffs in the settlements. All have recognized that there is virtually no risk now that the settlements in the Corrugated case could in any way be affected by application of this legislation to pending cases.

Another contention has been that the application of the new legislation to pending cases would help only a few defendants who are facing heavy damages. In fact, there are now more than 900 corporate defendants in over 180 pending multiple-defendant price-fixing cases at various stages of the litigation process.

All of those companies will be denied the benefit of the new legislation unless it is applied to pending cases. Antitrust cases typically continue for years, especially the complex class actions which spawned this legislation, and the remedial benefit of the law would therefore not take effect for years unless applied to pending cases. A single court would have one remedy for old cases and another for new cases. Americans would be treated differently by the law, one as against another, and needlessly.

A delayed application of the law would be contrary to general principles of law which, as the Supreme Court has said, dictate that remedial legislation be applied to pending cases absent a showing of manifest injustice. Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974). See also Gulf Offshore Company v. Mobil Oil Corporation, 101 S. Ct. 2870 (1981) at Fn. 16.

Moreover, it may well be that under present law a court could order claim reduction, including the "carve-out" formula of the proposed legislation, in a pending case without any further statutory authority from Congress, and there are pending cases where that legal position is being presented.

If Congress enacts claim reduction legislation that expressly prohibits application to pending cases, it would inevitably undercut the existing rights of some defendants.

The sum of the matter is that the present law is aberrational. It is the result of joint and several liability, treble damages, and modern class actions. Rather than treble damages, some price-fixers in antitrust cases are paying far less than their share of single damages, and indeed are profiting while those who are not so obviously guilty and assert their constitutional right to a trial may end up paying 10, 50 or even 100 fold damages rather than treble damages based on their market share.

There is something wrong with a system of law that rewards manifestly guilty price-fixers who settle and thereby enables those companies in some instances to make profits derived from their own price-fixing. It is equally unfair to correct this injustice only in future cases by allowing the inequity to continue unchecked in the pending cases which created the need for the corrective measures.

Without this amendment I think we might have to consider revising the promise above the entrance to that great building across the street. We might have to make it say:

"Equal Justice Under the Law--Later"

The proposed legislation, applied to pending cases, is therefore needed to ensure fairness, to preserve sound antitrust policy, and to promote the deterrent effect of the antitrust laws.

Griffin B. Bell

97TH CONGRESS
1ST SESSION

S. 995

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

IN THE SENATE OF THE UNITED STATES

APRIL 10 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself, Mr. BAUCUS, Mr. DECONCINI, Mr. HEFLIN, and Mr. LAXALT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of

EXHIBIT A: COMPROMISE AMENDMENT LANGUAGE this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply ~~only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section."~~. to all actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

"(f)(1). The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under Section 4, 4A, or 4C of this Act which are pending on the date of enactment of this section, unless the court determines in an action in which a release or covenant has been signed by the parties prior to the date of enactment of this section that it would be manifestly unjust, in light of subsection (f)(2) and other circumstances, to apply the principle of that action.

"(f)(2). No agreement to settle, compromise, or release a claim under Section 4, 4A, or 4C of this Act which has been signed by the parties prior to the date of enactment of this section may be rescinded, disapproved, reformed, or modified by the parties or by the court because of the application of the claim reduction principle, except upon the written consent of all the parties thereto.

"(g). Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections: Provided, That subsections (f)(1) and (f)(2) are not severable from each other, and the invalidity of any provision of those subsections as applied in an action shall render the remainder of those subsections inapplicable in that action."

The CHAIRMAN. Judge, please come forward and have a seat.

STATEMENT OF CHARLES B. RENFREW, LAW FIRM OF PILLSBURY, MADISON & SUTRO, SAN FRANCISCO, CALIF.

Mr. RENFREW. Good morning, Mr. Chairman, Senator Byrd.

I am pleased to be before this committee to share my views as to why the benefits of S. 995 should not be denied to litigants in pending litigation. I base my testimony on my experience as an antitrust practitioner, as a former Deputy Attorney General, and as a former U.S. district judge.

As the Chairman will recall, I testified on December 7 of last year on the reasons that I felt we have an unforeseen and massive distortion of the private antitrust enforcement that Judge Bell just outlined this morning. At that time I deliberately did not take any position with respect to the applicability of S. 995 to pending litigation. I have given the matter considerable thought. I have concluded that there really are no valid reasons for not making this legislation applicable to pending cases.

The whole subject of the right to contribution and claim reduction has generated a great deal of attention. I do not think there is a single issue in this legislation that has generated as much debate and has caused as much controversy as the question of its applicability to pending cases. I am afraid that there may be more heat than light shed in this area, Mr. Chairman.

I think what we need now is a very careful and a very thoughtful analysis, not impasssioned debate. I think if we think through this, this committee will conclude, as I have, that there simply is no reason not to make this legislation applicable to pending cases.

What I would like to do this morning is explain the reasons why I believe this legislation should be applicable to pending cases, explain in some detail the amendment which I would make to the delayed applicability portion of the act, address the very legitimate and very proper concerns that have been expressed by those who oppose applicability, and point out why the amendment I support would, I believe, fairly and fully address them.

With respect to why this legislation should apply to pending cases, Mr. Chairman, I think the equities are now very clear. At my December 7 testimony I referred to a study which we had undertaken with respect to a number of the districts in this country to determine the extent of price fixing claims that are pending in the U.S. district courts. We have completed that survey. It is attached as an exhibit to my prepared testimony. I would like my prepared testimony made a part of this record if that is all right, Mr. Chairman.

The CHAIRMAN. It will be made a part of the record following your oral statement.

I might add at this point that in just a few minutes I have to open the Senate as President pro tempore. Senator Byrd has indicated he will be kind enough to preside.

Mr. RENFREW. All right, Mr. Chairman.

We now know that there are over 900 companies that are in cases in which they are faced with price fixing charges. It would seem to me a cruel irony if the very cases that precipitated the necessity, the imperative of this legislation were denied its benefits. We might also have the anomalous situation because of the duration and pendency of these cases in which there may be cases in which different rules were applied, where some parties were entitled to rights of claim reduction and others were not in cases involving similar claims, perhaps identical claims, and perhaps before the same judge.

We have heard in the prior testimony of some of the horrendous problems and crushing potential liability that has faced a number of the defendents in these cases. The *Plywood* litigation is one such instance where we know the three nonsettling defendants there face substantial potential liability because of the cumulative sales of settling defendants that have been put upon them.

We also know in the *Corrugated Container* case that the single nonsettling defendant there faces potential liability, plaintiff's lawyers claim, in the amount of hundreds of millions of dollars.

These cases were brought to the Senate's attention in 1979, but by no means are they the only cases. For example, there is the *Arizona Dairy Products* case in which a defendant was joined by an amended complaint almost 6 years after litigation was commenced, years after it got out of the business where it had about a 10 percent interest in the alleged market, and plaintiffs claim it is liable for potential liability in excess of $1 billion in a situation where all the other defendants settled for some $4 million.

Exhibit A to my prepared testimony indicates that a great many industries are involved now: health care, food, cement, steel, aluminum, entertainment, petroleum products, linerboard, timber, lumber, and many, many other industries.

No price fixer should escape liability, but no innocent company should be forced to pay tribute because it simply has found itself in a situation where it is faced with industrywide liability that would in effect bankrupt it and, we contend, effectively deny it its access to the courts.

There are a number of examples. In the *Western Asphalt* case the smallest producer of asphalt by far had to settle out at a far higher percentage payment according to its market share than any of the other defendants simply because it could not stand the risk of economic ruin. In the *Western Sugar* case a small defendant there had to make the same decision.

Indeed, in the *Corrugated Container* case one company, in order to pay its settlement amount of over $3 million where it had 1 percent of the market share, was forced to close a plant and lay off 200 employees. Later that defendant was found not guilty of participating in the conspiracy.

Indeed, I think it is interesting that that special jury verdict indicated that some 14 defendants in the *Corrugated Container* case who paid over $40 million in settlement were subsequently found not to have been parties to a conspiracy.

During the pendency of this litigation, a company which is faced with this potential industrywide liability has a great deal of trouble getting credit in financial circles. I think this is something that simply cannot continue.

With respect to making this legislation applicable to pending cases, the law is very clear. Our great Chief Justice John Marshall in the *United States* v. *Schooner Peggy* set forth the general rule in 1801. That is that legislation will be applied to cases pending at its effective date. There are two exceptions: One, if it is clear that Congress intended another date; second, if applying it to a pending case would result in manifest injustice.

The rule is no different in antitrust cases. There have been a number of antitrust legislations that have applied to pending cases. The Hart-Scott-Rodino bill in part applied to pending cases. The Soft Drink Interbrand Competition Act applied to pending cases. The Newspaper Preservation Act applied to pending cases. When section 4 of the Clayton Act was amended to provide a uniform Federal statute of limitations, it applied to pending cases. When direct appeal to the U.S. Supreme Court in certain antitrust cases was provided, it too applied to pending cases.

There are presently pending three pieces of legislation which I believe will be held to be applicable to pending cases. One is the International Joint Venture Act of 1981. Another is the Antitrust Reciprocity Act of 1981. The third is the act which will exempt from the copyright laws the home recording for noncommercial purposes of video tapes.

People opposing the applicability of legislation to pending cases have the burden, the burden I believe they cannot sustain.

Now I would like to address how this legislation should be made applicable to pending cases and in what way. I think there are a number of things.

First, like Judge Bell, I believe that contribution should be prospective. Contribution should not apply to pending cases. Second, the right to claim reduction or carve out should be applicable to pending cases with the proviso that it would not be done where it would result in manifest injustice.

Third, it should be very clear that no settlement agreement which has been signed by the parties can be set aside or modified or rejected because of this legislation. Fourth, there should be a severability clause between the inability to set aside any settlement and the applicability of claim reduction so that in the unlikely circumstance that somehow a settlement were set aside, then claim reduction would not apply in that case.

I think this proposal is eminently fair to all the parties. It enhances and continues our national policy of favoring and encouraging settlements. The parties in the litigation that gave rise to the necessity for this legislation were well aware of the pendency of the right to contribution and claim reduction claims. With this awareness at no time did they ever tell any court in connection with seeking approval of the settlement that the settlement should not be approved or should be set aside if in the future claim reduction should become applicable. Indeed, they argued exactly the contrary.

I think an example of the chronology of events in the *Corrugated Container* litigation is helpful. On May 20, 1979, there was the first preliminary approval of a settlement in that case. Before that date nonsettling defendants had asserted the right to contribution and claim reduction. The only appellate court decision on this issue was in the Eighth Circuit, the *Professional Beauty Supply* case, and in that circuit decision the right to contribution and claim reduction was upheld. Third, Senator Bayh introduced legislation in this committee permitting the right to contribution and claim reduction.

It was with this background that 4 days before, the lead counsel for the plaintiffs in the *Corrugated Container* litigation, arguing for approval of the settlements which would bring some $298 million to the plaintiff classes, said that under present law he urged the court to accept that settlement, and if in the future the admiralty rule, which is some type of comparative negligence, comparative responsibility, were applied to antitrust cases, that would be a different circumstance that would face them at that time.

Clearly this indicated an awareness of this possibility on his part. I think also that no settlement provision is going to be set aside because of the grounds or the charges of mistake or impossibility of performance or commercial frustration.

Let me now turn to some of the concerns which have been expressed. I think they are legitimate concerns. I think they are proper concerns. They are concerns which this committee must address. I think you will be as satisfied as I that the amendment which I have just outlined will meet these concerns. They are four in number.

The first is that this legislation, if applied to pending cases, has very serious constitutional questions and is essentially an unsound policy matter.

The second is that it would cause massive disruption, complication, and prolong existing cases.

The third is that it effects special legislation designed to bail out a very few companies who gambled on legislation and lost to the detriment of thousands of other companies that relied upon existing law.

The fourth is that the nonsettling defendants are not going to be forced into bankruptcy.

First of all, with respect to the constitutionality question, I am not going to address that. We have an eminent authority, Senator Ervin, to discuss that. I will say that I concur in his judgment that it is entirely constitutional, a judgment I should add that is also concurred in by former Attorney General Griffin Bell and former Solicitor General Robert Bork.

I do think it important, however, that the committee bear in mind the difference between the congressional responsibility to say who may sue, the right to contribution, and the judicial prerogative of effecting claim reduction. That distinction was made very clear during the oral arguments in *Texas Industries.*

Indeed, in its opinion, in outlining the reasons why Congress and not the court had the power to provide for the right of contribution, the court was careful to distinguish between that right and the judicial prerogative to look at and to examine the "scope of the remedy that Congress has provided." That is a quote from that decision. That is at 451 U.S. 640.

Indeed, in the Fifth Circuit, in approving the settlements in the *Corrugated Container* case, the Fifth Circuit rejected the nonsettling defendant's argument with respect to contribution on the basis of Texas Industries, but they did not treat the right to claim reduction in the same manner. They said the right to claim reduction was irrelevant to the issue of the approval of the settlements and that that argument was best left to another day and another forum. That is in 659 F.2d 1328 n. 3.

I think this is terribly important that the courts have made this distinction. I think this committee should bear it in mind as well. The reason for it is that the right to claim reduction is a court created rule. It is a rule of equity. It is designed to promote equity in those situations where another court generated rule, joint and several liability, causes inequity.

I would like to turn to the question about the unsoundness of the policy of making this legislation applicable to pending cases. The general authority cited for this proposition is the report of the antitrust section of the American Bar Association. They raise two objections.

If it is applied to pending cases, they say, one, this may interfere with settlements in progress, and, two, it will be prejudicial to parties who have participated in the litigation in joint defense on the assumption there would not be a right to contribution.

Clearly under the amendments that I propose, since contribution would be prospective only, that argument is gone and we cannot affect under this legislation any existing settlements. Those two grounds are eliminated.

With respect to the concern that somehow this legislation would disrupt and create complications and prolong existing legislation, that simply is not the case. Claim reduction does not create any new cause of action. It does not affect the substantive rights of antitrust law. It is not going to add any new parties. It is not going to require discovery. It will not prolong the cases at all. All we have to determine is the relative market share or the sales of the parties, a very simple thing to do.

With respect to the claim that somehow this is special legislation to the benefit of those who went to court, gambled, and lost, and they should be stuck with their bargain, to the detriment of thousands of other companies that relied on the law as it was at that time, the very simple answer is it is not a very few companies. There are literally hundreds of companies faced with price fixing cases that could find themselves in the very situations we have discussed at these hearings.

Settlements cannot be set aside under the legislation as amended by the amendment I support. The plaintiffs will be able to get treble damages, attorneys' fees, and costs from every defendant found liable. The parties in all of these litigated matters were aware of the possibility of claim reduction and the right to contribution.

Indeed, I think it is very interesting to go to the closing argument of lead counsel for the plaintiffs in the *Corrugated* case. The judge in that case asked the jury not to fix a dollar amount of damages but to fix the percentage the jury felt was attributable to the overcharge resulting from the conspiracy. Counsel for the nonsettling defendant argued that this was a massive amount when you applied that percentage times the sales in the industry.

Opposing that argument, Mr. Susman said, and I quote, "No one knows what the judge is going to eventually determine whether the law requires me to be responsible for someone else's sales. It is simply immaterial." In making that argument, he acknowledged that there would be the possibility and that that possibility existed of claim reduction applicable at some time in the future. There cannot be an argument made that indeed they relied upon the law as it was then and that somehow this Congress does not have the right to change the law. No parties, no court can hold this Congress hostage because of the existing status of the law.

Finally I would like to address the claim that somehow the nonsettling defendants will not be made bankrupt. In support of this they cite statements made by representatives of the Mead Corp. They believe that that is a viable company and will survive this litigation.

Mr. Susman has said he is not going to drive these companies to bankruptcy. He will accept hundreds of millions of dollars less in settlement of this case. I think it is wrong for one person or private persons to have this power. By making this statement I think he tacitly acknowledges that he has that power. I think that is wrong.

In conclusion, it seems to me that this legislation is fair to the plaintiffs. We do have the manifest injustice proviso which will permit the law to evolve over a case-by-case basis. It will be fair to settling defendants, to litigating defendants, but most importantly it is fair for the public because it permits the distortion which has existed in our antitrust laws to be remedied. I think our antitrust laws now will enhance and promote competition and not be used to injure it.

Thank you.

[Prepared statement of Charles B. Renfrew follows:]

PREPARED STATMENT OF CHARLES B. RENFREW

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Charles B. Renfrew and I am an attorney with the San Francisco law firm of Pillsbury, Madison & Sutro. I am very pleased to appear before you this morning to share with you the reasons why I have become convinced that the delayed applicability provision contained in S.995 should be amended. I base my opinion on my experience as an antitrust practitioner, as a former Deputy Attorney General, and a former United States District Judge.

On December 7, 1981, I testified before the Committee in support of S.995 because I believed this legislation was urgently needed to prevent unjust, unfair and inequitable results. S.995 will restore fairness to our system of private antitrust enforcement by eliminating situations in which industry-wide treble damage claims can be used unfairly against a non-settling defendant. Enactment of this legislation will restore to a defendant that believes it has a valid defense on the merits the option of proving its innocence without being subjected to enormous, escalating settlement demands based upon the cumulative sales of settling co-defendants in addition to its own.

Under the existing law, treble damage actions too often have become irrational games, decided not on the merits but on a defendant's place in line. The growing inevitability of forced settlements in large class action suits effectively denies many defendants (and particularly smaller defendants) their basic right of access to the courts.

While at first I deliberately took no position on the applicability of S.995 to pending cases, I have given considerable thought to the matter and have now concluded that there are no valid reasons why the eminent fairness of the proposed legislation should be denied to present litigants. Indeed, it is only by application of the legislation to pending cases that Congress can prevent continued unfair and inequitable results to many hundreds of defendants now facing claims within the coverage of the proposed legislation.

While the basic question of contribution and claim reduction has been given considerable attention recently, the single issue which has generated the greatest debate and, I submit, more heat than light as to the underlying equities, is the applicability of S.995 to pending cases. A proper resolution of this issue requires thoughtful analysis, not impassioned debate. Yet in light of the facts that have been developed and the understanding we have gained as to the need for the legislation, I believe it will not be hard for the Committee to conclude, as I have, that the legislation should be applied to pending cases as I shall explain in greater detail.

What I would like to do this morning is explain the reasons why the legislation should not be limited only to future cases, outline the manner in which I would recommend it apply to pending cases, address the legitimate concerns which have been raised by those opposing applicability, and point out why I believe the amendment I propose would meet these concerns.

The Need for S.995 to Be Applied to Pending Cases

The equities are clear. More than 900 companies, small and large, are now defending civil antitrust cases involving claims of price fixing before the courts.[1] Unless the delayed applicability provision of Section 4I(e) is amended, every one of these companies will be denied the "rights of reasoned fairness" that are provided in S.995. It would be a cruel irony to deny the remedial benefits of S.995 to litigants in the very cases that have so clearly demonstrated the necessity for the legislation.

Furthermore, application only in future cases, as S.995 now provides, would create an anomaly. There would be pending before the courts at the same time some cases to which this legislation applied and others to which it did not. It would be intolerable for some litigants to receive entirely different treatment than others facing the same type of claims, or in some instances identical claims, perhaps before the same judge. The difference in treatment would depend on a completely arbitrary date. Moreover, reporting favorably on S.995 as introduced, without an amendment, could produce additional litigation by stimulating the filing of treble damage actions to avoid application of the bill.

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[1] The survey that I mentioned during my testimony before the Committee on December 7, 1981 has been completed. Counsel of record shown on the docket sheets and other pleadings in pending antitrust cases involving price fixing were contacted to confirm the active status of the case and other particulars. The final summary is attached as Exhibit A.

The compelling need for this legislation has been dramatically demonstrated to this Committee by the facts of a number of pending cases.[2] These include two cases, which I believe are among the first nationwide antitrust class action cases ever brought to trial.

In the Plywood Antitrust Litigation, M.D.L. No. 159 (E.D. La.), the three non-settling defendants face substantial potential claims based not only on their sales but also on sales of other defendants who settled.

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[2] See S. Rep. No. 428, 96th Cong., 1st Sess. (1979) ("Senate Report"); Antitrust Equal Enforcement Act of 1979, Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) ("1979 Senate Hearings"). Additional evidence concerning pending cases was presented in hearings before this Committee on April 22 and December 7, 1981 and before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary on October 21, 1981.

In the Corrugated Container Antitrust Litigation, M.D.L. No. 310 (S.D. Tex.), the single remaining defendant faces potential claims according to plaintiffs of hundreds of millions of dollars, based not only on its own sales, but also on the sales of other defendants who settled.

Although these cases, among others, were first brought to the attention of Congress during 1979, there is still time to prevent further unfairness to the remaining parties. Moreover, hundreds of companies in other pending cases should be afforded the benefits of S.995.

For example, in the Arizona Dairy Products Litigation, No. Civ. 74-569A PHX CAM (D. Ariz.), a defendant named for the first time in an amended complaint filed almost six years after the litigation began and years after it got out of that business, could face claims of more than $1 billion according to plaintiffs, even though it accounted for less than 10% of sales in the alleged market, because other defendants previously settled for $4 million.

As shown even by casual inspection of the companies listed on Exhibit A, cases are being brought against an exceedingly wide range of American industries. Thus, the same potential for injustice exists in health care, cement, steel, aluminum, food, entertainment, petroleum products, linerboard, lumber and timber, and many other industries. Because these private treble damage actions are so fundamental a part of our basic antitrust policy, I am very concerned that a deferred effective date for this legislation could lead to seriously anticompetitive results.

No price-fixer should escape liability. And, no innocent defendant should be forced to pay tribute, merely because it is named in a broadside complaint that includes virtually every member of an industry. Nor should a defendant be required to pay 30, 40, or 50 times damages, in a case in which Congress intended to require payment of three times damages. Moreover, it is directly contrary to the basic purpose of the antitrust laws to early settling parties to cripple their competitors by transferring cumulative liability through privately negotiated settlement agreements. It is a distortion of the antitrust laws to permit them to be used for anticompetitive purposes and by methods which impair, not promote, competition.

In 1975, the one remaining defendant that was by far the smallest named in the Western Asphalt Antitrust Litigation, M.D.L. No. 24, finally was forced to settle for far more on a percentage basis than its co-defendants, or face bankruptcy.[3]

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[3] 1979 Hearings, at 71-72.

One of the smaller companies in the Western Sugar Antitrust Litigation, M.D.L. No. 201, with some seven or eight percent of the western market, was forced to abandon its defenses because early settling defendants, representing some 40 percent of total sales, had settled without removing their sales from the case.[6]

In the Corrugated Container case, a defendant was forced to close one of its plants, laying off 200 workers, in order to meet plaintiffs' settlement demands.[7] The jury later found that company had not been a conspirator. Indeed, fourteen companies that settled in that case for more than $40 million later were found not to have participated in any conspiracy.[8]

On the other hand, companies named in these suits that do not settle but attempt to litigate to prove their innocence find themselves foreclosed from access to financial markets during the pendency of the cases, because of the unfair rules that currently apply. These results represent a terribly inefficient and unwise economic policy. Transfer of capital assets of this magnitude should not be merely arbitrary--reflecting only the litigation strategy of private parties.

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[6] 1979 Hearings, at 72.

[7] Supplemental Statement of U.S. Corrugated Fibre-Box Company In Support of Approval of Proposed Settlement, In re Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D. Tex. Apr. 24, 1979).

[8] Special Verdict, In re Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D. Tex. Sept. 13, 1980).

S.995 should be amended to apply to pending cases so that the hundreds of defendants in cases now before the courts do not provide more examples of this sort of abuse. There should be no occasion for future Sahuaro Petroleum's, U.S. Corrugated Fibre-Box's or Green Bay's to testify before this Committee as to the unfairness of the antitrust laws. The proposed amendment will protect companies in pending cases against the unforeseen and severe distortion of the antitrust remedy which faces them today.

Applicability to Pending Cases--as the Rule, Not the Exception

Congress has on many occasions made numerous antitrust and other statutes applicable to pending cases. Indeed, a basic rule of statutory construction is that newly enacted legislation is to be applied immediately upon its effective date and in pending cases, unless to do so would result in manifest injustice or Congress expressly providing otherwise. At this point I must point out that those who have opposed applicability to pending cases have done so on the ground they oppose "retroactivity," a somewhat misleading and inappropriate word. It is a term that has no application here. I will discuss the inapplicability of that term to the pending cases in slightly more detail later.

There are many examples of legislation being applicable to pending cases in the antitrust field. The Hart-Scott-Rodino Antitrust Improvements Act, which, among other things, amended 15 U.S.C. § 26 to provide for attorneys' fees in injunction actions, was passed on September 30, 1976. Since the Act was silent as to the application of its attorneys' fees provision to pending cases, that provision was applied in a case pending on appeal at the time of its enactment.[7]

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[7] Alphin v. Henson, 552 F.2d 1033 (4th Cir.), cert. denied, 434 U.S. 823 (1977). The following colloquy was relied upon by the Fourth Circuit:

> 3. During the Senate debates, Senator Abourezk asked Senator Hart (the moving force behind the legislation):
>
> > Does this mean that following the usual rule, as in such cases as Bradley v. School Board of the City of Richmond, 416 U.S. 696 [94 S.Ct. 2006, 40 L.Ed.2d 476] (1974), actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorneys' fees awards?
> >
> > MR. PHILIP A. HART. The answer is "yes," under that case and a number of other comparable cases.
> >
> > Cong.Rec. S. 8960 (daily ed. June 10, 1976) (94th Cong., 2d Sess.)

552 F.2d at 1035 n.3

The Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501 (Supp. IV 1980), which exempts territorial restrictions in the distribution and sale of soft drink products from the antitrust laws and modifies the tolling provisions of the Clayton Act's statute of limitations, was upheld as applicable to pending cases.[8]

The Newspaper Preservation Act, 15 U.S.C. § 1804(b) (1976), which exempted certain newspapers from the antitrust laws, was applied to pending cases.[9]

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), was amended in 1955 to provide a uniform, federal limitations period. Even though the amendment had the effect, in some cases, of reducing the period of damage claims, its application to pending cases was upheld.[10]

When Congress provided for the appeal of certain antitrust cases directly to the Supreme Court in 15 U.S.C. § 29 (1976), the Act was expressly applicable in pending cases.

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[8] Coca-Cola Co. v. FTC, 642 F.2d 1387, 1390 (D.C. Cir. 1981).

[9] Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

[10] Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608 (2d Cir.), cert. denied, 363 U.S. 811 (1960).

Similarly, bills now before Congress would apply in cases pending on the date of enactment. For example, on April 20, 1981, the Senate Judiciary Committee reported favorably on The Antitrust Reciprocity Act of 1981, S. 816, which eliminates treble damage suits by foreign governments, and is expressly applicable to pending cases. S. 816 quickly passed the Senate by voice vote on July 9, 1981.

On October 21, 1981, S. 1758 was introduced to exempt from the copyright laws certain private, non-commercial recording of copyrighted works on home video cassette recorders. Since the bill is silent it would apply in pending cases as it is apparently intended to do.

On December 18, 1981, The International Joint Venture Act of 1981, S. 1968, was introduced to exempt certain international joint ventures and acquisitions from Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The bill expressly provides that it applies to all proceedings "pending on or after the date of enactment."

Most federal legislation is silent as to application date and therefore under the general rule applies in pending cases. Congress also frequently enacts laws expressly stating that they apply to pending cases.[11] The Supreme Court has consistently upheld the constitutionality of applying new statutes to pending cases.[12]

The Proposed Amendment Protects Existing Settlements

While there are a number of other possible amendments to the delayed applicability provision of S.995, I favor the following proposed amendment circulated among Committee members, which provides:

1. Contribution will be available only in cases commenced after the date of enactment.

2. The claim reduction principle of subsection 4I(b) will apply in pending cases, except where to do so would be manifestly unjust.

3. Settlements signed prior to the date of enactment are expressly protected and cannot be "rescinded, disapproved, reformed or modified by the parties or by the Court" because of claim reduction.

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[11] E.g., 28 U.S.C. § 1331 (Supp. 1981); 25 U.S.C. § 640d-27 (Supp. 1981); 19 U.S.C. § 1303 (1976); 12 U.S.C. § 1904 (1976); 28 U.S.C. § 1346 (1976); 18 U.S.C. § 4202 (1976); 18 U.S.C. § 4251 (1976); 42 U.S.C. § 405 (1976); 42 U.S.C. § 423(b) (1976); 28 U.S.C. § 1491 (1976).

[12] E.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Carpenter v. Wabash Railway, 309 U.S. 23 (1940); Funkhouser v. J.B. Preston Co., 290 U.S. 163 (1933).

4. Finally, a severability provision specifically links the claim reduction principle and settlement safeguards so that they are not severable from each other. Thus, if a court would order claim reduction only if an existing settlement were set aside, it could not do so pursuant to this amendment.

Plaintiffs are protected by Section 4I(f)(1), which incorporates the limited "manifest injustice" exception to the general rule that a court is to apply the law in effect at the time it renders its decision. Although I am unaware of any pending case within the scope of this legislation in which it would be manifestly unjust to order claim reduction, all plaintiffs in pending cases will have the opportunity to prove this on a case-by-case basis. Thus, the courts, before whom such cases are pending, will be able under this amendment to determine whether fundamental unfairness would result from claim reduction in particular cases.

Defendants that have settled prior to the date of enactment are completely protected by the amendment language. A court could find in some cases that it would be manifestly unjust to apply claim reduction. In any event, the courts most knowledgeable of the cases would make those decisions.

The Case Law Protects Existing Settlements

Settlements for a sum certain made in good faith upon the advice of competent counsel cannot be rescinded or modified because of a subsequent change in the law.[13] More specifically, recognition of claim reduction rights is "irrelevant" to approval or disapproval of settlements in an antitrust class action.[14] Thus, the enactment of S.995 would not provide any reason to depart from the settled rule concerning the binding effect of settlement agreements, notwithstanding a subsequent change in law.

The case law conclusively demonstrates that a party has no right to rely on congressional action or inaction on legislation affecting the factors considered in entering into a settlement agreement. The terms of the agreement are subject to future legislation. Indeed, Congress has the power to legislate changes in the law as it existed at the time of the agreement in ways that may affect the rights of the parties.[18]

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[13] E.g., In re Master Key Antitrust Litigation, 76 F.R.D. 460 (D. Conn. 1977), aff'd, 580 F.2d 1045 (2d Cir. 1978); Thomas v. State of Louisiana, 534 F.2d 613 (5th Cir. 1976); Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc., 489 F.2d 974 (7th Cir. 1973).

See also Chicago & N.W. Ry. Co. v. Wilcox, 116 F. 913 (8th Cir. 1902); Heston v. Chicago & N.W. Ry. Co., 341 F. Supp. 126, 128 (N.D. Ill. 1972) (plaintiff's mistaken belief at the time of settlement as to the effect of a permanent injury did not invalidate settlement agreement).

[14] In re Corrugated Container Antitrust Litigation 659 F.2d 1322, 1328, n.3 (5th Cir. 1981).

At the time the parties entered into settlements in pending cases, they did not have any vested right to expect that there would be no future congressional action concerning contribution and claim reduction. Thus, existing settlement agreements must be read to contain an implicit term that the parties understand that Congress could pass legislation affecting the factors considered in reaching those agreements. In fact, there has been no such reliance because counsel in pending treble damage actions have been following this issue carefully.

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[18] For example, in Louisville & Nashville Railroad Co. v. Mottley, 219 U.S. 467 (1911), the Supreme Court analyzed the powers of Congress to affect the rights of parties as they existed when a settlement agreement was reached:

> "Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority."

219 U.S. at 484 (emphasis added).

See also Chicago, Burlington & Quincy Railroad Co. v. McGuire, 219 U.S. 549 (1911) (a party has no right to rely on a statute which existed when a contract was entered into, but was subsequently amended).

For example, review of the chronology of the events in the Corrugated Container litigation makes it abundantly clear that plaintiffs cannot claim good-faith reliance upon the continuation of the law in effect at the time of the settlement in those cases. Throughout the period of the negotiations of the settlements and their approval by the courts, the parties were well aware that contribution and claim reduction rights had been asserted in that litigation. Despite this awareness, at no time did plaintiffs suggest to any court that, were claim reduction permitted, then the settlements should not be approved. Indeed, they argued exactly the opposite.

The basic facts are that the first preliminary approval of a settlement was made on May 20, 1979. Prior to that time, non-settling defendants had asserted contribution and claim reduction rights. The only appellate court decision on this issue permitted contribution and claim reduction[16] and legislation had been introduced in the Senate permitting contribution and claim reduction.[17] At the May 16, 1979 pretrial conference concerning preliminary approval of the initial settlement agreements, contribution and claim reduction were discussed. At that pretrial conference the court specifically said that the non-settling defendants could raise the issue of claim reduction after trial.[18] Plaintiff's lead counsel,

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[16] Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

[17] On May 15, 1979, Senator Bayh offered an amendment in markup of The Antitrust Procedural Improvements Act of 1979, S. 390, permitting contribution and claim reduction in antitrust cases. The amendment was silent as to applicability date and therefore would have applied to pending cases under the manifest-injustice standard.

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[18] [THE COURT:]

> Why isn't this argument [for claim reduction] one that can be made after, assuming there is a jury verdict, and after damages have been assessed, why can't this same argument be made in a motion to reduce the damages as it's applicable to some individual defendant?
>
> * * *
>
> Isn't that when you make this argument, rather than now. . . . Even if I finally approve it [the settlements], you still get down to the same argument--[t]he jury comes in with damages and Packaging and Westvaco, let's say, are the only two defendants on trial. And the jury, comes in with an award that's "X" millions of dollars. And you say, Judge, my goodness, that's unfair to us. The jury is assessing against us a greater share of the market than we should bear. And so, therefore, you should reduce this judgment by some proportion of our share of the market, just as they did when they negotiated the settlements.
>
> It seems to me that that is when this argument should properly be made and could be persuasive, but it seems to me premature to be making that argument at this time.
>
> * * *
>
> [I]t seems to me that it [claim reduction] would be an argument that you could make at the conclusion of the case when you're talking about a motion before the Court to reduce the damages against those

Mr. Susman, argued that the settlements should be approved even though the rule with respect to claim reduction was subject to change by the time M.D.L. 310 was finally adjudicated.[19]

Thus it was that on May 20, 1979, the preliminary approval was made with an awareness on the part of all parties that claim reduction might be applied. On December 31, 1979, the district court finally approved the pending settlements, even though claim reduction might be applied to the case.

[Footnote continued]

> defendants that go on trial on the basis that they're--the jury, having considered all of the market in assessing these damages on trial a greater portion of the damages than they should sustain because we--after all, we only sold one percent of the market and you're asking us to share 100 percent of the damages.

Tr. at 52-56.

[19] [Mr. Susman:]

> But I'm saying that the Court, in assessing that argument, we were asking the Court to say that present law is such that Susman, et al. had right under present law the acceptance of $298 million from the 22 settling defendants has not reduced the total amount they can recover, if they can recover any. That's present law.
>
> Now that doesn't mean that three years from now or two years from now, or a year from now, when the case goes to the jury and the Fifth Circuit decides something and holds that these admiralty cases suddenly get applied to antitrust cases, that Susman, et al. will be in the same position, but under present circumstances, he's right.

Tr. at 68.

Indeed, at the time of the civil trial the issue of the application of claim reduction was undecided. On July 28, 1980, long after the settlements had been approved, and in the middle of the civil trial, the district court stated that it was considering permitting claim reduction.[28]

Again on December 1, 1980, the district court denied Mead's request for claim reduction, but stated:

> I personally think that it is a good idea, but I find no support in it in law and I think, basically, it is a congressional problem and not a judicial problem . . . .

Tr. at 56.

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[28] [THE COURT:]

> I am very seriously considering, and probably will do it, to include in the [jury] charge, relative to damages, a charge concerning the market share of the defendants in the way of a claim reduction . . . .
>
> . . . it seems to me that, in this case, if you took a percentage of the sales over the period of time that the defendants on trial here should only be liable for their market share of that total.
>
> In other words, just as an example, if the jury came in with a verdict of--let's just say a billion dollars, and Mead's market share is 2.3%, then I would think that the liability against Mead would be 2.3% of the total.

Vol. 55 Tr. at 192-3.

Finally on October 29, 1981, the Fifth Circuit affirmed the adequacy of the settlements. The court, in a footnote, recognized that Mead had asserted the right of claim reduction in M.D.L. 310, but held that "Mead's arguments are best left to another day and another forum."[21]

Nor would enactment of this legislation provide any basis to rescind any existing settlement agreement upon the general contract principles of mistake, impossibility of performance, or commercial frustration. To obtain rescission on the basis of mistake, the mistake must be concerned with a present or past fact.[22] Any attack on an existing settlement could only assert a mistake concerning a future fact, i.e., the enactment of legislation providing for claim reduction after the settlement agreements were negotiated.

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[21] In re Corrugated Container Antitrust Litigation, 659 F.2d 1322, 1328, n.3 (5th Cir. 1981).

[22] Anderson v. Ciba-Geigy Corp., 490 F.2d 438 (8th Cir. 1974). The Eighth Circuit stated:

> "The rule is that, in order to vitiate a settlement, a mistake must be mutual, material, and concerned with a present or past fact. Stetzel v. Dickenson, 174 N.W.2d 438 (Iowa 1970). The record in this case indicates that if any mistake characterized Anderson's settlement negotiations, it concerned a future fact . . . . As the Iowa Supreme Court has observed, "[p]ractically every settlement . . . involves the element of chance as to future consequences and developments. There are usually unknown and unknowable conditions . . . that may affect the ultimate recovery or failure of recovery. Mutual ignorance of their existence cannot constitute 'mutual mistake.'"

490 F.2d at 442 (emphasis added).

The doctrine of impossibility (or commercial impracticability) provides no basis for rescinding the settlement agreements. For commercial impracticability to apply: (1) an unexpected contingency must have occurred; (2) the risk of the contingency must not have been allocated either by agreement or by custom; and (3) the occurrence of the contingency must have rendered performance commercially impracticable.[23] Here there will be no impediment to performance and the enactment of an amended S. 995 will not satisfy the tests for an unexpected, unallocated risk.[24]

The commercial frustration doctrine excuses performance when a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.[25] It does not apply here, however, where the risk of the supervening event was reasonably foreseeable by the parties, and a provision addressing that contingency could have been inserted in the agreement.[26] Indeed, the doctrine of commercial frustration or frustration of purpose is limited "to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."[27] There can be no reasonable argument that any existing settlement would be upset or affected in any way by enactment of an amended S.995.

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[23] Transatlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) (closure of the Suez Canal did not render performance of the contract commercially impracticable because the parties were aware "as were most commercial men with interests affected by the Suez situation" that the canal might become a dangerous area).

[24] Pauley Petroleum, Inc. v. United States, 591 F.2d 1308 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979) (rejecting claims of commercial frustration based on promulgation of a new Department of Interior regulation governing lessee liability for oil spills that imposed for the first time an "absolute liability" standard for oil pollution).

The Concerns of Opponents Have Been Met or Lack Substance

Let me now turn to the very proper concerns which have been raised by those who oppose applicability of S.995 to pending cases. There are basically four reasons given in support of this opposition:

1. Applicability to pending cases is unsound policy and raises serious constitutional questions.

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[25] Strauss v. Long Island Sports, Inc., 600 A.D.2d 501, 401 N.Y.S.2d 233, 238 (1978); Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 180 P.2d 888, 891 (1947).

[26] United States v. Buffalo Coal Mining Co., 345 F.2d 517 (9th Cir. 1965); Berline v. Waldschmidt, 159 Kan. 585, 156 P.2d 865, 867-68 (1945).

[27] United States v. Gen. Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 381 (2d Cir. 1974).

2. It will cause massive disruption, and it will complicate and prolong pending cases.

3. It is special legislation that will bail out a few recalcitrant companies who gambled on litigation and lost to the detriment of thousands of other companies that relied upon in good faith the status of present law.

4. Non-settling defendants will not in fact be thrown into bankruptcy.

Evaluation of each of these objections with the proposed amendment I support shows either the concerns to be met or not to be of any legal or equitable substance.

With respect to the argument that the proposed amendment making carve-out or claim reduction applicable to pending cases is somehow unconstitutional, I understand that this issue will be addressed specifically by Senator Sam Ervin. I shall not burden the Committee with my views on this issue, because I agree completely with Senator Ervin, who believes it is constitutional, as do former Solicitor General Robert Bork and former Attorney General Griffin Bell.

Moreover, I think it important for the Committee to distinguish between the legislative power to create a right of action such as an action for contribution and the judicial power to effect claim reduction. While it is true that the

Supreme Court last May in Texas Industries[28] held it was Congress's responsibility (not the courts') to create a cause of action for contribution, it was careful to distinguish that situation from the judicial power to effect claim reduction which, I submit, is an inherent power that the courts already possess.

This distinction was explicity recognized in the oral argument in Texas Industries.[29] The Supreme Court differentiated Congress's prerogative to say who may be able to sue from the judicial role to identify "the scope of the remedy that Congress has provided."[30] Claim reduction does not involve a separate right of action nor does it affect the substantive law of antitrust. It is, rather, a direct outgrowth of the judiciary's obligation to identify the scope of the remedy at law and is intimately related to the relationship between the plaintiff and the defendant and the plaintiff's ability to obtain damages from the defendant. It is a judge-made rule to insure equity in situations where another judge-made rule--joint and several liability--threatens inequity.

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[28] Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

[29] Tr. 79-1194 (March 3, 1981).

[30] 451 U.S. at 640.

The rule was decidedly not intended to grant a plaintiff an arbitrary and unfettered license to determine which co-conspirator to saddle with industry-wide treble damages and which one may escape, particularly when such a selective punishment contravenes equitable principles. If the opportunity for full recovery is within plaintiff's control, plaintiff then is able to recover from all co-conspirators, and thus the rule of joint and several liability is satisfied. Indeed, in the recent decision of the Fifth Circuit affirming the settlements in the Corrugated Container case, the court cited Texas Industries in rejecting contribution but declined to treat claim reduction in the same manner and said that the non-settling defendant's arguments with respect to claim reduction were "best left to another day and another forum."[31] While I am firmly persuaded that the courts already possess inherent powers to grant claim reduction and carve-out, since this subject is presently before Congress, in order to eliminate any uncertainties, no matter how slight, I believe S.995 with an amendment should be enacted. Moreover, the provisions of S.995 provide a specific flexible formula for ordering carve-out that will assist in achieving consistent and fair application of the principle.

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[31] 659 F.2d at 1328 n.3.

As to the soundness of the proposed policy underlying the amendment, opponents cite the statement by the Antitrust Section of the American Bar Association expressing concern about application of contribution and claim reduction legislation to pending cases. The Antitrust Section report said it would upset settlement calculations already in process and second, that parties could be prejudiced who had already participated in the conduct of joint defense efforts on the assumption of no contribution. However, those concerns have no basis under my proposal. First, contribution would not be available except in future cases and second, as I have previously pointed out, settlements would be protected.

Let me now respond to the claim that application to pending cases will cause massive disruption and complicate and prolong pending cases. Here it is claimed that if S. 995 is made applicable to pending cases, this will bring in new parties, require additional discovery, and cause unnecessary delay in the resolution of these cases. However, under the amendment I support, contribution will only be prospective; there will be no new parties or issues. Claim reduction will not add any new cases to the courts' dockets, add new parties or create new complexities. The calculation by which a plaintiff's claim must be reduced will be set forth in the record, and in almost all horizontal price-fixing cases will be the market shares or sales volume of the various defendants.

The third objection is that application to pending cases is, in effect, special legislation that will bail out a few recalcitrant companies that gambled on litigation and lost and work to the detriment and expense of thousands of others that operate in good faith under the present law. As the survey attached to my prepared testimony shows, it is not a few companies that are affected by this litigation but many hundreds of companies in a wide variety of industries.

Opponents claim that making claim reduction applicable to pending cases will bar plaintiffs from full recovery from the non-settling defendants and that there is a risk, however slight, that someone might move to set aside existing settlements on the grounds that, at the time they were approved by the court, recovery of the full amount of industry wide damages was available from non-settling defendants and that to permit claim reduction is such a change in circumstances as to make the earlier settlements not fair or reasonable. There are several answers to this contention.

First of all, the legislation is specific that claim reduction would not be applied if their previously arrived at settlement was to be set aside. Courts cannot condition their approval of settlements upon the continued operations of the law then in effect in the future. Such an effort would be clearly a violation of the separation of powers and an attempt to hold the legislature hostage and prevent it from fashioning new legislation to address problems which were brought to the legislature's attention because of inequitable results in litigated matters. As I have previously shown, the parties in these cases are really in no position to claim justifiable reliance or surprise.

Second, under S.995, carve-out means that plaintiffs will still be entitled to recover treble damages, attorneys' fees, interest and costs from every defendant found liable. The legislative history shows the congressional intent to facilitate and protect settlements,[22] and the proposed amendment has been carefully drafted to provide complete protection for existing settlements. The proposed language protects the interests of all concerned, including litigating defendants, settling defendants, and plaintiffs.

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[22] The Senate Report on S. 1468 states:

> Subsection (c). To protect the settlement process, subsection (c) provides that any person who settles a price-fixing suit in good faith is not liable for contribution to any other person with respect to the claim that is the subject of the settlement. Defendants will not enter into settlement agreements unless they know in advance that the settlement will end conclusively their involvement in litigation and exposure to liability. That is the principal purpose of settling, and a major purpose of this bill is to help effectuate just settlements . . . non-settling defendants will not have a basis upon which to claim contribution for such damages from settling defendants. However, to encourage settlements, subsection (c) has been included to provide conclusively that a settling party would not be liable to other parties for contribution.

Senate Report at 23-24; emphasis supplied.

Finally, based upon my experience as a federal trial judge, I am quite surprised that opponents of this legislation would assert that simply because one availed oneself of a constitutional right to defend oneself in court that if a gross injustice follows that somehow the election of the remedy to litigate bars one from complaining of any resulting inequity or injustice. In the area of criminal law, it would be unconscionable to attempt to punish a defendant for exercising his constitutional right to have his guilt or innocence determined at a trial. Similarly, it is equally wrong to say that anyone who exercises his right to defend himself in court must accept the result, regardless of how unjust or unconscionable.

Fourth, the opponents say that non-settling defendants will not be required to pay hundreds of millions of dollars. They cite statements made by representatives of The Mead Corporation and quote lead counsel for the plaintiffs in the Corrugated Container case that he will not force Mead to pay hundreds of millions. However, quoting lead counsel for plaintiffs as stating that he will not force non-settling defendants to pay staggering sums and will ask for some lesser sum suggests that he has the power to do so. Congress should assure that no private person should have that type of power with the potential harm to thousands of employees and stockholders and to the entire economy.

While the interest of the antitrust class action plaintiffs' bar in maintaining the greatest possible strategic superiority in litigation may be understandable, it is surprising that anyone else would oppose this bill. I believe this has occurred for two reasons. First, it is a classic phenomenon in multi-party litigation that the interests of an early settling defendant have a strong tendency to coalesce with those of the plaintiff or plaintiff class. Second, during the 1970s, the phenomenon of the "blue chip" plaintiff has involved large companies on both sides of substantial private antitrust litigation. The antitrust claims have either been asserted in the first instance, or have developed as counterclaims in trademark, patent, contract, or other commercial litigation. Of course, in many instances these cases have been viewed as an instrument for achieving competitive advantage in a particular market or industry.

In this context, any analysis of fairness to plaintiffs must carefully be distinguished from the question of relative economic or competitive advantage. I suppose that some plaintiffs and members of the plaintiffs' bar are reluctant to concede that fairness demands that antitrust defendants are not coerced into excessive forced settlements and that no one defendant should be forced to pay for what someone else did. Presumably, plaintiffs would be perfectly happy to recover 40 times damages rather than the treble damages provided in the Clayton Act. While such results may be to someone's advantage, they are unfair and destructive of our overall public policy to foster and enhance rather than lessen competition by the destruction of competitors. The important fact is that application of S.995 to pending cases will extend the fairness of the basic bill to additional cases. Under the proposed amendment it will do so without any negative effect. If one supports S.995, one should support this amendment as well.

Most importantly, the proposed amendment language, which embodies the recognized "manifest injustice" exemption from application of new legislation to pending cases, is dispositive of concern for fairness to plaintiffs. The proposed language guarantees plaintiffs the opportunity to avoid application of claim reduction wherever it would be fundamentally unfair. The judge who has heard the entire case would make such determination on a case-by-case basis. Thus, the proposed amendment absolutely protects the rights of plaintiffs and plaintiff classes.

Conclusion

Through the years, as I have tried complex cases as a practitioner and as a judge, I have been involved in negotiation of settlements, negotiation of judgment sharing agreements, and have been faced repeatedly with the responsibility of deciding how damages should be apportioned. I am convinced from examination of this issue that Congress should specify the flexible guidelines for fair allocation of antitrust damages provided in S.995.

To achieve the basic goals of the antitrust laws, to insure fairness to all litigants, and to prevent recurrence of the unfair results we have seen, I believe it is very important that Congress enact an amended S.995.

EXHIBIT A

COMPANIES DEFENDING CIVIL ANTITRUST CASES INVOLVING CLAIMS OF PRICE FIXING NOW PENDING BEFORE THE UNITED STATES DISTRICT COURTS[1]

1. A-1 Beverage Co.
2. Aalco Distributing Co.
3. Abbott & Associates
4. AC Company
5. Acme Beverage, Inc.
6. Acra-Pierce, Ltd.
7. Action Toyota, Inc.
8. Adair Realty Co.
9. Admiral Heating & Ventilating Co.
10. Aerosmith Corp.
11. A. E. Staley Manufacturing Co.
12. Air Polynesia, Inc.
13. Airport Toyota, Inc.
14. Air Shields, Inc.
15. Alaska Lumber & Pulp Co.
16. Albertson's, Inc.
17. Alcan Aluminum Corporation
18. Alderman & Taminosian, P.A.
19. Ale Bornstein, Inc.
20. Alexandria Toyota, Inc.
21. Al G. Schneider & Associates, Inc.

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[1] Companies listed are litigating defendants in multidefendant antitrust cases involving claims of price fixing in 68 of the 95 districts of the federal court system. This list is derived from a survey conducted during October, November, and December 1981, and is based upon a Report of the Administrative Office of the United States Courts, review of pleadings and docket entries in the 68 Courts surveyed, and telephone interviews of counsel of record in each case.

Some companies are named in more than one case, but listed only once. Individuals and related companies, to the extent possible, have been excluded. New cases and developments in some cases after October 31, 1981 may not be reflected.

The districts surveyed are shown below at 19-21.

22. Allegheny Toyota, Inc.
23. Allen, Knudson & Schwartz
24. Allied Artists Pictures Corp.
25. Allied Chemical Co.
26. Allied Supermarkets, Inc.
27. Allstate Insurance Co.
28. Alpha Concrete Corp.
29. Alpha Portland Industries, Inc.
30. Al Sweet Motor Sales, Inc.
31. Alton Ochsner Medical Foundation
32. Aluminum Company of America
33. Amalgamated Sugar Co.
34. The Ambriola Co., Inc.
35. Amerada Hess Corporation
36. American Art Clay Company
37. American Cinema Releasing
38. American Crayon Company
39. American Export Lines, Inc.
40. American International Pictures, Inc.
41. American Maize Products Co.
42. American Multi-Cinema, Inc.
43. American Sunroof Corp.
44. American Title Insurance Co.
45. Amfac, Inc.
46. Aminoil USA, Inc.
47. Amoco Oil Co.
48. Amstar Corporation
49. Amtel, Inc.
50. Anderson & Litwack Co.
51. Anderson's Peanuts
52. Anheuser-Busch, Inc.
53. Annapolis-Toyota, Inc.
54. Anton Motors, Inc.
55. The Apex Corp.
56. Approved Careers, Inc.
57. ARA Services, Inc.
58. Arden-Mayfair, Inc.
59. Argonaut Insurance Co.
60. Arkansas Cement Corporation
61. Armada Corp.
62. Armco Steel Corp.
63. Armored Transport
64. Armour Pharmaceutical Co.
65. Arrow Electric Co.
66. A. S. Berman, Inc.
67. Ash Grove Cement Company
68. Ashland Oil, Inc.
69. Askew Realty Co., Inc.
70. Associated Hospital Service of New York (Blue Cross)/United Medical Service, Inc. (Blue Shield)

71. Associated Milk Dealers, Inc.
72. Associated Milk Producers, Inc.
73. Association of Stop-N-Shop Supermarkets
74. Atlanta Board of Realtors, Inc.
75. Atlantic Container Line, Ltd.
76. Atlantic Richfield Company
77. Atlas Prestress, Inc.
78. Avco Embassy Pictures Corp.
79. A & W Foods
80. Az-Tech Products, Inc.
81. Baird & Warner, Inc.
82. Ballenger Corp.
83. Bama Toyota
84. Barnett Bank of Ft. Myers
85. Bartels Agency
86. The Barton Co., Inc.
87. Barton & Ludwig, Inc.
88. Bavarian Village, Inc.
89. Baylor College of Medicine
90. Beer Distributors of Indiana, Inc.
91. Bel Air Motors, Inc.
92. Bellis-Hanley, Inc.
93. Belvin J. Kishbaugh, Inc.
94. Benson Steel, Inc.
95. Bentley Electric Co.
96. Bergen Brunswick Dental Laboratories, Inc.
97. Bergman Toyota, Inc.
98. Bessemer & Lake Erie Railroad Co.
99. Best Beers of Bloomington, Inc.
100. Best Toyota, Inc.
101. Bethlehem Steel Corporation
102. Beverly Heating Co.
103. Bevon-Herron, Inc.
104. Beyer Farms, Inc.
105. Bill Fry Ford, Inc. d/b/a Bill Fry Ford - Toyota
106. Bill Penney Toyota Co.
107. Binney and Smith, Inc.
108. Bintz Sports, Inc.
109. Birdson Corp.
110. Bi-Rite Supermarkets, Inc.
111. B & J Diversified Steel Products
112. Blakely Peanut Co.
113. Bland Electric Co.
114. Blount Construction Co.
115. Bobart, Inc. d/b/a Capital City Mazda - Toyota
116. Bob Mayberry Chevrolet - Toyota, Inc.
117. Border Steel Rolling Mills, Inc.
118. Borg, Inc.
119. Boyd's
120. Bradco Supply Corp.
121. Brock Electric Co., Inc.

122. Brown & Root, Inc.
123. Bruce Browne, Inc.
124. Buckeye Concrete Co., Inc.
125. Buckhead Brokers, Inc.
126. Bud Haas Toyota, Inc.
127. Buena Vista Distribution Corp.
128. Bullard Realty Co.
129. Bumble Bee Seafoods
130. Burmah Oil & Gas Co.
131. Butler Steel Corp.
132. The Butte Independent Insurance Agency, Inc.
133. Butte-Silver Bow Council of Commissioners
134. Buzz Berg Wrecking Co.
135. Byness Inc.
136. Byrnes Brothers
137. Cadillac Brick Co.
138. Caldwell, Banker & Co.
139. California & Hawaiian Sugar Co.
140. C.A. Lindell, Inc. & Son
141. Calvert Motors, Inc.
142. Cambridge Air Filter Corp.
143. Canadian Steel Sales, Ltd.
144. Canine Eye Registration Foundation
145. Capehart Corp.
146. Capitol Aggregates, Inc.
147. Capitol Distributors Corp.
148. Carecraft Industries, Ltd.
149. Cargill, Inc.
150. Caribou Four Corners, Inc.
151. Carling National Breweries, Inc.
152. Carlson Real Estate
153. Carolina Power & Light Co.
154. Carr Brothers, Inc.
155. Carter & Associates
156. Castle & Cook, Inc.
157. Castle Toyota, Inc.
158. Catalano Stop-N-Shop
159. C. Brewer & Co.
160. The Ceco Corp.
161. Celotex Corp.
162. Centex Corporation
163. Central City Toyota, Inc.
164. Central Milk Producers Cooperative
165. Central Milk Sales Agency
166. Century Brick Co.
167. Century 21 Showcase of Homes, Inc.
168. C. F. Gibbs Lumber Co.
169. C. F. Schwartz Motor Co., Inc.
170. C. G. Campbell & Sons, Inc.
171. Champion International Corporation
172. Charles A. Bott, Inc.

173. Charmer Industries, Inc.
174. Charter International Oil Co.
175. Charter Medical Corp.
176. Checkered Flag Motor Car Co. d/b/a Checkered Flag Toyota
177. Cheker Oil Co.
178. Chester Mack Toyota, Inc.
179. Chevron U.S.A., Inc.
180. Chicago Title Insurance Co.
181. Chronicle Publishing Co.
182. Chrysler Motor Corp.
183. Cinerama Releasing Corp.
184. Circle K Corp.
185. Citadel Cement Corporation
186. Cities Service Company
187. Citizens Title & Trust Corp.
188. C.J. Rogers Construction Co.
189. Claussen Paving Co.
190. Clayton County Board of Realtors, Inc.
191. Cleveland Builders Supply Co.
192. Cliffside Trading, Inc.
193. Climatemp, Inc.
194. Clover Realty Co.
195. Cobb County Board of Realtors, Inc.
196. Coldwell, Banker & Co.
197. Cole National Corp.
198. College Toyota, Inc./Oakridge Toyota
199. Collier Carbon & Chemical Corp.
200. Collinwood Shale, Brick & Supply Co.
201. Colonial Baking Co.
202. Columbia Pictures Industries, Inc.
203. Columbia Wards Fisheries
204. Cominco American, Inc.
205. Commerical Metals Co., Inc.
206. Commercial Steel Products Co.
207. Commonwealth Land Title Insurance Co.
208. Computerized Multiple Listing Service, Inc.
209. Comsteel Products, Inc.
210. Consolidated Enterprises, Inc. d/b/a Rathjen
211. Consolidated Freightways Corp.
212. Consolidated Sales Associates, Inc.
213. Construction Supervisory Services, Inc.
214. Consumer Builders Supply Co.
215. Continental Motor Sales Co., Inc. d/b/a Auto Mall
216. Continental Oil Company
217. Copeland Toyota, Inc.
218. Coplay Cement Manufacturing Co.
219. Corn Sweetners, Inc.
220. Cott Corp.
221. Cotton Baking Co., Inc.
222. Couch Construction Co.
223. Country Counter, Inc.

224. The County of Pima
225. CPC International, Inc.
226. Crescent News Distributors
227. Crest Realty Co.
228. Crone Associates
229. Crouse Sheet Metal Works, Inc.
230. Crown Oil Corp.
231. Crown Sales, Inc.
232. Croyste Toyota, Inc.
233. Crystal Lake Associated Listing Service
234. CSX Corp.
235. C. T. Love & Associates, Inc.
236. Cuisinarts, Inc.
237. Cumberland Associates
238. C. W. Albans, Inc.
239. C. W. Johnson
240. C. W. Matthews Contracting Co.
241. Cyprus Hawaiian Cement Corp.
242. Dahlen Construction Co., Inc.
243. Daniel Insurance Agency, Inc.
244. Dairylea Cooperative, Inc.
245. Dart Containerline Company Limited
246. Darton, Inc.
247. Data Fax
248. Dean Hebb Toyota, Inc.
249. DeKalb Board of Realtors, Inc.
250. DeKalb Distributors
251. DeLeon Peanut Co.
252. Dellwood Foods, Inc.
253. Delmonte Corp.
254. Denise, Inc. d/b/a Travel Time
255. Deshler Insurance Agency
256. Detroit Hockey Club, Inc.
257. Detroit Lumberman's Association
258. Dieter's Gourmet Foods
259. Dillion Companies, Inc.
260. Di Salvo Trucking Co.
261. Distribution East Corp.
262. Dominick Motor Co.
263. Drewry's Limited U.S.A., Inc.
264. Duncan Petroleum Transport, Inc.
265. Durbin-Stovall Associates
266. East Jefferson General Hospital
267. East Texas Motor Freight Lines, Inc.
268. Ebby Halliday, Inc.
269. Economy Mechanical Industries, Inc.
270. Eddie Thomas Insurance Agency, Inc.
271. Educational & Recreational Services, Inc.
272. Edwards Pontiac-Cadillac, Inc.
273. E. I. DuPont de Nemours & Co.
274. Elco Industries, Inc.

275. Electronic Realty Associates, Inc.
276. Eles Imports, Inc. d/b/a Clover Toyota
277. Eli Lilly & Co.
278. Elmhurst Milk & Cream Co., Inc.
279. E. L. Noe & Sons, Inc.
280. Emanuel Mesh d/b/a Crown Cream Co.
281. E. Remy Martin & Co., S.A.
282. Erno's Archery Shop
283. Esses-Costello Real Estate
284. Evco Associates
285. Excavation Construction, Inc.
286. Exchange Bank of Lee County
287. Exxon Corporation
288. The Eye, Ear, Nose and Throat Hospital
289. Falconi Toyota Motors, Inc.
290. Familian Northwest, Inc.
291. Farmers Fertilizer & Milling Co.
292. Fazio's a/k/a Fish Foods, Inc.
293. Federated Dept. Stores, Inc.
294. F. E. Moran, Inc.
295. Fidelity National Title
296. Filmways Pictures
297. First American Title Insurance Co. of Arizona
298. First Multiple Listing Service, Inc.
299. First National Bank of Ft. Myers
300. First National Insurance Agency of Butte, Inc.
301. First National Stores, Inc.
302. First National Supermarket, Inc. d/b/a Pick-N-Pay Supermarkets
303. First Union National Bank
304. Fisher Corp.
305. Fisher Foods, Inc.
306. Flame Gard, Inc.
307. Fleets
308. Fleischmann Distilling Co.
309. Flint Goodridge Hospital of Dillard University
310. The Flintkote Company
311. Flint Oil & Gas Co.
312. Florida Power Corp.
313. Florida Steel Corp.
314. Follet St. Louis University Bookstore
315. Food Fair Stores, Inc.
316. Fortenberry Realty Co.
317. Foster Toyota Inc.
318. Fox Carskadon, Inc.
319. Franciscan Lines, Inc.
320. Franz Haniel & CIE, GmbH
321. Fred Buck d/b/a Fred Buck Realtor
322. Fredericktown Toyota, Inc.
323. Fred Weigel Electric Co.
324. Freeman Chemical Corp.
325. FTC Communications, Inc.

326. Fulker Toyota, Inc.
327. F. W. Owens & Associates, Inc.
328. Gallery of Homes Service Corp.
329. Gannett Pacific Corp.
330. Garland Real Estate Board of Realtors, Inc.
331. Garst-Receveur Construction Co.
332. Gary Energy Corp.
333. General Cable Corporation
334. General Cinema of Arizona, Inc.
335. General Cinema Corp.
336. General Portland, Inc.
337. Georgia Association of Realtors, Inc.
338. Georgia-Pacific Corporation
339. Getty Oil Company
340. Giant Portland Cement Co.
341. Gideon Engineering
342. Glass Specialty Co., Inc.
343. Gleason Corporation
344. Gleisner Coach Works Corp.
345. Glenmore Distilleries Co.
346. Globe Glass & Trim Co.
347. Globe Wholesale Company
348. Goldberg, Rubenstaine, Buckley, P.A.
349. Gold Kist, Inc.
350. Gold Medal Farms, Inc.
351. Gordon H. Ball, Inc.
352. Gourmet Foods, Inc.
353. Grain Processing Corporation
354. Grand Prairie Board of Realtors
355. Grand Union Co.
356. Granex Corp., USA
357. Gray Storage & Dryer, Inc.
358. Great Atlantic & Pacific Tea Co.
359. Greater Dallas Board of Realtors, Inc.
360. Great Western Sugar Co.
361. The Greyhound Corp.
362. Grier Abrasive Sales Corp.
363. Grigus Inc.
364. Groesbeck Lumber Co.
365. Group 3 Electronix
366. Guarantee Electric Co.
367. Guinta Brothers, Inc.
368. Gulf Abstract & Title, Inc.
369. Gulf Oil Corporation
370. Gwinett County Board of Realtors, Inc.
371. Haggerty Lumber & Supply Co.
372. Hamrick Toyota, Inc.
373. Hansen Neyerburg Export-Import GmbH
374. Hans Jensen & Sons, Inc.
375. Hapag-Lloyd Aktiengesellschaft
376. Harford Contracting Co.

377. Harold Collins
378. The Harry Nace Co.
379. Hartman Motor Cars Co.
380. Hawaiian Science Tours, Ltd.
381. Hawaiian Trust Co., Ltd.
382. Hawaii Newspaper Agency
383. Hawthorne Mellody, Inc.
384. Hays & Nicoulin, Inc.
385. Hearst Corp.
386. Heinen's, Inc.
387. Helene Curtis Industries, Inc.
388. Hemp Bros., Inc.
389. Henderson Electric Co., Inc.
390. Henderson, Franklin, Starnes & Holt, P.A.
391. Henry Kehl Enterpirses, Inc.
392. Henry S. Miller Residential Services, Inc.
393. Hertz Corp.
394. Hexlel Corp.
395. Hickey - Toyota, Inc.
396. Hillhaven, Inc.
397. The Hillhaven Foundation, Inc.
398. Hillhaven West, Inc.
399. Hillsborough Development Co., Inc.
400. Hillside Dairy Co., Inc.
401. Hilltop Motors, Inc.
402. Hitachi Sales Corp. of America
403. Hoffman Wallpaper Corp.
404. Holiday Theatres 123 Corp.
405. Holly Sugar Co.
406. Hoover Toyota, Inc.
407. Hornsby Oil Co.
408. Hospital Corporation of America
409. Hotel Dieu
410. House of Sobel
411. Houston Radiology Association
412. H. R. F. T., Inc. d/b/a Tower Toyota-Dodge
413. HST, Ltd.
414. Hubinger Co.
415. Hudson Electric Co.
416. Hugo Stinnes, A.G.
417. Hull Coal & Builders Supply Co.
418. Hunter Clark Ventilating
419. Huval Baking Co., Inc.
420. Hygrade Milk & Cream Co., Inc.
421. Ideal Baking Co. of Paris, Inc.
422. Ideal Basic Industries, Inc.
423. Ideal Heating Co.
424. Illinois-California Express, Inc.
425. Illinois Heating & Ventilating Co.
426. The Image Maker Corp.
427. IML Freight, Inc.

428. Import City, Inc.
429. IND/AG Chemicals, Inc.
430. Inter-City Trading, Inc.
431. Inter-Island Resorts, Ltd.
432. International Minerals & Chemicals Corp.
433. International Paper Company
434. Iowa Beef Processors, Inc.
435. Irving Board of Realtors
436. Island Airfilters, Inc.
437. ITC Entertainment, an ATV Co.
438. ITO Tour Service, Inc.
439. ITT World Communications, Inc.
440. JAC Tours, Inc.
441. Jack Richard Simplot
442. Jackson Associates (a/k/a Coupe Construction)
443. Jack W. Boone & Co.
444. Jacob Reed
445. James E. Smith & Sons, Inc.
446. James F. Barton Contracting Co.
447. James W. Halterman, Inc.
448. Japan Travel Bureau International, Inc.
449. J. D. Restaurant
450. Jetour USA, Inc.
451. Jewel Companies, Inc.
452. J. H. Bennett, Inc.
453. Jim Owens d/b/a Jim Owen Photographics
454. Jim Walter Corp.
455. Jimmy Shea Insurance Agency
456. Joc Oil, Inc.
457. Joe H. Hayes Electric Co., Inc.
458. Joel Confer AMC, Inc. d/b/a Joel Confer Toyota
459. John B. Wagner Associates
460. John Crump Toyota, Inc.
461. John H. Fuhler Real Estate
462. Johns Manville Sales Corp.
463. Johnson Memorial Hospital, Inc.
464. Jones Plymouth, Inc.
465. Joseph Schlitz Brewing Co.
466. J. Ray McDermott and Co., Inc.
467. J.S.P. Investments, Inc.
468. Julius Wile Sons & Co., Inc.
469. Julliard, Inc. d/b/a Julliard Alpha Liquor Co.
470. JVC America, Inc.
471. J. W. Beverage Co.
472. K-2 Ski Co.
473. Kahn & Lessin Co.
474. Kaiser Aluminum and Chemical Corp.
475. Kaiser Cement & Gypsum Corp.
476. Kelleher Inc.
477. Ken Crump Toyota, Inc.
478. The Kent Steel Products, Ltd.

479. Ketchikan Pulp Co.
480. Keystone Portland Cement Co.
481. Key Toyota, Inc.
482. Kimbob, Inc.
483. Kintetsu International, Inc.
484. Kirchberg Realty
485. Knickerbocker Liquors Corp.
486. Knobloch Toyota Park, Inc.
487. Koppers Co., Inc.
488. Krause, Inc.
489. Krebs & King Toyota, Inc.
490. The Kroger Copany
491. Krupa Oil Co.
492. Laclede Steel Corp.
493. Lafayette Beverage Distributors, Inc.
494. Laidlaw Corp.
495. Lakeside Trading, Inc.
496. Lancaster Toyota, Inc.
497. Landstrom Distributors, Inc.
498. The Lane Construction Co.
499. Larcon Petroleum, Inc.
500. Laurel Toyota, Inc.
501. Lawrence Aviation Industries, Inc.
502. The Lawson Milk Co.
503. Lawyers Title Insurance Corp.
504. Le Club de Hockey Canadien, Inc.
505. Lee County Bank
506. Lee Newman
507. Lee-Way Motor Freight, Inc.
508. Lehigh Portland Cement Co.
509. Lehman's Garage, Inc.
510. Levitz Furniture Co., Inc.
511. Lew-Ann, Inc.
512. Liberty Mutual Insurance Co.
513. Link Electric Co., Inc.
514. Lockwood Friedman Film Corp.
515. Loew's Corp.
516. Lone Star Industries, Inc.
517. Long Island News Corp.
518. Loomis Armored Car
519. Losinger Ltd.
520. Louisiana Health Service and Indemnity Co.
521. Louisiana Ready-Mix Co., Inc.
522. Louisville Cement Co.
523. Lucky Stores, Inc.
524. Lu Do & Lu Ym Corp.
525. Lustine Toyota, Inc.
526. M & M Glass Service
527. MacDougald Construction Co.
528. Mack Trucks
529. Madison Square Garden Center, Inc.

530. Malone & Hyde, Inc.
531. Malow Corp.
532. Manchester Cream Company, Inc.
533. Mann Theatres Corp. of California
534. Manufacturers Hanover Trust Co.
535. Marathon Oil Company
536. Maricopa County Medical Society
537. Maricopa Foundation for Medical Care
538. Marine Electric Co., Inc.
539. Marquette Co.
540. Martin Enterprises, Inc.
541. Martin Marietta Corp.
542. Martin Toyota, Inc.
543. Martros Theatre, Inc.
544. Matrix Properties, Inc.
545. Matsushita Electric Corp.
546. Matthews Book Co., Inc.
547. McCoy Surgical Supplies, Inc.
548. McCrackin-Sturman Toyota, Inc.
549. McDonough Toyota, Inc.
550. McDowell Materials Corp.
551. McGeorge Car Co., Inc.
552. McKee Realtors, Inc.
553. The Mead Corporation
554. Meadowbrook Farms, Inc.
555. Meadville Toyota, Inc.
556. Medical Personnel Pool, Inc.
557. Medical Personnel Pool of Tuscon, Inc.
558. Medicenters of America, Inc.
559. Medina Concrete Supply Co.
560. Medusa Corporation
561. Mehring & Hanson-Wendt
562. Mellish & Murray Co.
563. Mercy Hospital of New Orleans
564. The Methodist Hospital
565. Metro-Goldwyn-Mayer, Inc.
566. Metropolitan Tobacco Company, Inc.
567. MGA Melco Sales Corp.
568. Michigan Beverages, Inc.
569. Michigan Brick, Inc.
570. Mid-Atlantic Toyota Distributors, Inc.
571. Middletown Electric Co.
572. Mid-South Airlines, Inc.
573. Mid-South Aviation, Inc.
574. Midwesco-Adams Engineers, Inc.
575. Miller Brewing Co.
576. Miller Toyota, Inc.
577. Milliken & Co.
578. Milton Bradley Co.
579. Minolta Corp.
580. Minwax Co.

581. Missouri Portland Cement Co.
582. Mittel Electric Co., Inc.
583. M. J. Barclay Advertising, Ltd.
584. Moana Transportation, Inc.
585. Mobil Oil Corporation
586. Modern Tobacco Company, Inc.
587. Monarch Cement Company
588. Monolith Portland Cement Company
589. Montgomery Toyota, Inc.
590. Morbill Trading Corp.
591. Morris Park Farms, Inc.
592. Morse Electro Products Corp.
593. Morville's Mens Store
594. Motion Pictures Association of America
595. Moto Heating-Ventilating-Air Conditioning Corp.
596. Mountain View Toyota, Inc.
597. Muench Electric Co.
598. Murbach Coal & Supply Co.
599. Nagel Manufacturing Co.
600. Namrock Industries, Inc.
601. The Narowetz Co.
602. National Association of Food Chains
603. National Car Rent-A-System
604. National Cement Company, Inc.
605. National Distributors Advisory Council
606. National Fuel Gas Distributing Co.
607. National General Pictures Corp.
608. National Gypsum Co.
609. National Heat & Power Co.
610. The National Hockey League
611. National Lumber Co.
612. National Medical Consultants, Inc. d/b/a Kimberly Nurses
613. National Medical Enterprises, Inc.
614. National Provisioner, Inc.
615. National Service Industries, Inc.
616. National Starch and Chemical Corp.
617. National Sugarbeet Growers Federation
618. National Tea Co.
619. Nature's Best, Inc.
620. Navajo Freight Lines, Inc.
621. Nelbro Packing Company
622. Newman Steel, Ltd.
623. News Group Publications, Inc.
624. New York Mercantile Exchange
625. Nicholas George Theatres
626. Nippon Express USA
627. Nippon Travel Agency Pacific
628. NL Industries, Inc.
629. Northern Illinois Realty Service
630. North Fulton Realty Co., Inc.
631. Northside Realty Associates, Inc.

632. Northstar Financial Corp.
633. Northwestern Industrial Piping Inc.
634. Northwest Glass & Trim Service
635. Novo Industries
636. N.T.A. Pacific, Inc.
637. Nu-Service Tobacco Co., Inc.
638. NWS, Inc.
639. Ohio Optometric Association
640. Ohio Vision Services
641. OKC Corp.
642. Olan Mills, Inc. of Tennessee
643. Old Town Restaurant, Inc.
644. Olin Ski Co.
645. Olympic Trading, Inc.
646. Oregon Portland Cement Co.
647. Osborne, Inc.
648. Pabst Brewing Co.
649. Pacific Intermountain Express Co.
650. Pacific International Enterprises
651. Pacific Leisure Management Corp.
652. Pacifico Creative Service, Inc.
653. Pacific Scientific Corp.
654. Page Toyota, Inc.
655. Pan Pacific Commodities
656. Paramount Pictures Corp.
657. Paula Stringer Realtors, Inc.
658. Peerless Importers, Inc.
659. Pender Peanut Corp.
660. Pendleton Memorial Methodist Hospital
661. Penick & Ford, Ltd.
662. Penn Auto Sales, Inc.
663. Penn Central Corp.
664. Pennwalt Corp.
665. Pensy Supply Co.
666. Peoples Construction Corp.
667. Performance Motors, Inc.
668. Persis Corp.
669. Peter Alan Toyota, Inc.
670. Phelps Dodge Industries, Inc.
671. Phillips Brothers Export Corp.
672. Phillips Getschow Co.
673. Phillips Petroleum Company
674. Pigley Wigley
675. Pima County Medical Society
676. Pioneer National Title Insurance Co.
677. Piping Systems Inc.
678. Platoff Construction Co., Inc.
679. Plitt Inter-Mountain Theatres
680. Plumbing Specialties & Supplies, Inc.
681. Porter Brothers, Inc.
682. Portland Cement Company of Utah

683. Powerine Oil Company
684. Precision Dental Laboratories, Inc.
685. Premier Motor Co., Inc.
686. Prescon Corp.
687. Printronix, Inc.
688. Publix Supermarkets
689. Pullman Sheet Metal Works, Inc.
690. Puretest Milk Co., Inc.
691. Quality Beers, Inc.
692. Racon Inc.
693. Rainbow Tours, Inc.
694. RAK, Inc. d/b/a Candlelight Restaurant
695. Ralph E. Akers Construction Co., Inc.
696. R. A. Martin Co.
697. RCA Global Communications, Inc.
698. R. D. Ertley Toyota, Inc.
699. Ready Electric Co., Inc.
700. Red Ball Motor Freight, Inc.
701. Red Carpet Corp. of America
702. Reed and Prince Manufacturing Company
703. Reeves Peanut Co., Inc.
704. Rege, Inc.
705. Reider's, Inc.
706. Reinhardt Motors, Inc.
707. Reinhardt Toyota Troy, Inc.
708. Reliable Sheet Metal Works, Inc.
709. Resort Air Services, Inc.
710. Resort Aviation, Inc.
711. Revere Copper and Brass, Inc.
712. Reynolds Metals Company
713. R & H Motor Cars, Ltd.
714. Richard Auto Sales, Inc.
715. Rich Motor Mart, Inc.
716. Rini's Supermarkets, Inc.
717. R. J. Hefferman Electric Co.
718. Roadway Express, Inc.
719. Robbins & Myers, Inc.
720. Robert Irsay Co.
721. Robert Struck & Sons
722. Robinson Cadillac-Olds-Toyota, Inc.
723. Roblin Industries, Inc.
724. Rockdale Board of Realtors, Inc.
725. Rohrich Cadillac, Inc. d/b/a Rohrich Toyota
726. Rommel-McFerran Co., Inc.
727. Rosenthal Toyota, Inc.
728. Rosner Motors, Inc.
729. Ross Toyota Sales, Inc.
730. Rossignol Ski Co.
731. Rotary Oil Co.
732. Royal Imports of Delaware, Inc.
733. Royall-Ackerman, Inc.

734. Roy Jacobs Co.
735. Roy Payne Toyota
736. Ruhrkohle, A.G.
737. Russell Motor Cars, Inc.
738. Russo's, Inc.
739. Safeco Title Insurance Co.
740. Safeway Stores, Inc.
741. St. Luke's Episcopal Hospital
742. St. Mary's Hospital & Health Center
743. St. Paul Title Insurance Co.
744. San Antonio Portland Cement Company
745. Sanders-Langsam Tobacco Co., Inc.
746. Santee Portland Cement Corporation
747. Sanyo Electric, Inc.
748. Sargoy, Stein & Hanft
749. Scandecor, Inc.
750. Schaeffer/May Motor Sales, Ltd.
751. Schaeffer & Strohminger, Inc.
752. Schindler Brothers Steel
753. Sears, Roebuck & Co.
754. Seatrain Lines, Inc.
755. Service Equipment Maintenance Co., Inc.
756. Sewell's Big Star, Inc.
757. Shamrock Foods Co.
758. Sharp Electronics Corp.
759. Shell Oil Company
760. Shelor Toyota, Inc.
761. Shepard's Sales and Service, Inc.
762. Sherritt Fertilizers, Inc.
763. Sherwood Electronics Corp.
764. Shop Rite Foods, Inc.
765. Silver Spring Construction Co.
766. Silver Spring Toyota, Inc.
767. Simplot Industries, Inc.
768. Simpson Manufacturing, Inc.
769. Singleton & Associates
770. S. J. Reynolds Co.
771. Skaggs Companies, Inc.
772. Sloane Toyota, Inc.
773. S.M.R. Enterprises, Inc.
774. Sony Corp.
775. South Atlantic Trust
776. South Carolina Electric & Gas Co.
777. Southeastern Highway Contracting Co.
778. Southeast Toyota Distributors, Inc.
779. Southern Baptist Hospitals, Inc.
780. Southern Cotton Oil Co.
781. Southern Roadbuilders, Inc.
782. South Euclid Concrete Corp.
783. South Prairie Construction Co.
784. Speedcraft Enterprises, Inc.

785. Spratlin Associates, Inc.
786. Springfield Toyota, Inc.
787. Springhill Toyota, Inc.
788. Stable of Saginaw
789. Standard Brands Inc.
790. Standard Oil Co. (Indiana)
791. Standard Oil Co. (Ohio)
792. Standard Taylor Industries, Inc.
793. Stanley Furniture Co., Inc.
794. Star Industries, Inc.
795. State Farm
796. State-Leed Distributors, Inc.
797. Stauffer Chemical Co.
798. Steel City Ventilating & Sheet Metal Co.
799. Stevens Contractors, Inc.
800. Stewart Mechanical Enterprises, Inc.
801. Stewart Title Guaranty Co.
802. Stroh Brewing Co.
803. Struck, Inc.
804. Structural Metals, Inc.
805. Suburban Toyota, Inc.
806. Sullivan & Cozart
807. Sun Oil Company
808. Superior Toyota, Inc.
809. Supermarkets General Corp.
810. Surety Control Corp.
811. Sutco, Inc.
812. Tag Galyean, Inc.
813. Taledo & Associates, Inc.
814. Tamson Chevrolet Co.
815. Tauber Oil Co.
816. Ted McWilliams Motor City, Inc.
817. Tempkin Standard Dental Laboratories
818. Tenneco Oil Co.
819. Terminal Ready-Mix, Inc.
820. Texaco Inc.
821. Texas Steel Co.
822. Textron, Inc.
823. Thompson Toyota, Inc.
824. Thriftmarket, Inc.
825. Timonium Toyota, Inc.
826. Tip Top Farms, Inc.
827. Titanium Metals Corp. of America
828. Title Insurance Co. of Minnesota
829. Title Insurance Rating Bureau of Arizona, Inc.
830. Title Security Agency of Arizona
831. Tobacco Shed, Inc.
832. Tony Biscotte, Inc.
833. Torrey, Inc.
834. Tosco Corp.
835. Toshiba America, Inc.

836. Tote-Cart Company
837. Touro Infirmary
838. Tours, Inc.
839. Toyota of Anniston
840. Toyota Cars
841. Toyota of Roanoke Valley, Inc.
842. Toyota Selman, Inc.
843. Toyota of Sylacauga
844. Toyota Village, Inc.
845. Trammell Real Estate Corp., Inc.
846. Trane Co.
847. Transamerica Title Insurance Co.
848. Transcon Lines, Inc.
849. Trans World Airlines, Inc.
850. Tree of Life West
851. Trent Industries, Inc.
852. Tri-City Realty & Mortgage, Inc.
853. Tri-Eagle Dairies, Inc.
854. Trostle Oldsmobile, Inc.
855. TRT Telecommunications Corp.
856. T & T Wrecking Co.
857. Twentieth Century-Fox Film Corp.
858. Tysons Toyota, Inc.
859. Unicure, Inc.
860. Union Carbide Corp.
861. Union Clories, Inc.
862. Union Oil Company of California
863. Union Service & Maintenance Co., Inc.
864. United Artists Pictures Corp.
865. United Artists Theatres, Inc.
866. United Beverage Co.
867. United Brands
868. United Charter Service
869. United Coconut Oil Mills, Inc.
870. United Coconut Planters Bank
871. United Electric Co., Inc.
872. United Film Distributors
873. United Liquor, Division of Universal
874. United States Lines, Inc.
875. United States Steel Corporation
876. Universal Film Exchanges, Inc.
877. University Toyota, Inc.
878. UNR Industries, Inc.
879. U.S. Atlantic Homes, Inc.
880. U.S. Life Insurance Co. of Dallas
881. U.S. Pioneer Electronics Corp.
882. Utah Gas Service Co.
883. Valley Cement Industries, Inc.
884. Valley Stream Distributors Co., Inc.
885. Valley Toyota, Inc.
886. Visit USA Bureau, Inc.

887. Voris Inc.
888. VSL Corp.
889. Wagner Heating & Ventilating Co.
890. Waldbaum Supermarkets, Inc.
891. Walden Restorations, Inc.
892. Waldorf Toyota, Inc.
893. Wallick Lumber Co.
894. Walter B. Diecks Electric Co.
895. Ward Engineering Co., Inc.
896. Wards Cove Packing Company
897. Warner Brothers Distributing Corp.
898. Warren Ajemian Associates, Inc.
899. Washington Hockey Limited Partnership
900. W. C. Schlickli Construction Co., Inc.
901. Wehr Contractors, Inc.
902. Westates Carbon
903. Western Concrete Structures Co., Inc.
904. Western Gillette, Inc.
905. Western Union International, Inc.
906. West Jefferson Hospital
907. West Side Lumber & Concrete Corp.
908. Westview Concrete Corp.
909. Weyerhaeuser Company
910. Whitehall Cement Mfg. Co.
911. White Ready-Mix Concrete, Inc.
912. Whittenberg Engineering Co., Inc.
913. Wholesale Tobacco Distributors of New York, Inc.
914. Wilhelm Construction Co., Inc.
915. Willamette Industries
916. Winchester Toyota, Inc.
917. Windsor Heating
918. Windsor House, Inc.
919. Winn-Dixie Stores, Inc.
920. Wiregrass Toyota-GMC, Inc.
921. Wolf Baking Co., Inc.
922. Woodhaven News Co.
923. Wright Contracting Co.
924. W. Wanzenberg & Co.
925. Wyandotte Cement Incorporated
926. Yellow Freight System, Inc.
927. Younger Toyota, Inc.
928. Zack Co.

Districts Surveyed

The survey summarized herein began with review of the docket entries and pleadings in the fifty-nine United States

District Courts reported to have ten or more private antitrust cases pending as of June 30, 1981. See Report, Administrative Office of the United States Courts, Civil Antitrust Cases (N/S 410) by District Pending as of June 30, 1981 (Sept. 2, 1981) ("Report"). Additional districts were added as the survey progressed.

Districts surveyed were the following:

> District of Columbia (0090), Maine (0100), Massachusetts (0101), Rhode Island (0103), Connecticut (0205), New York, Northern (0206), New York, Eastern (0207), New York, Southern (0208), New York, Western (0209), Delaware (0311), New Jersey (0312), Pennsylvania, Eastern (0313), Pennsylvania, Middle (0314), Pennsylvania, Western (0315), Maryland (0416), North Carolina, Eastern (0417), North Carolina, Middle (0418), North Carolina, Western (0419), South Carolina (0420), Virginia, Eastern (0422), Virginia, Western (0423), West Virginia, Southern (0425), Alabama, Northern (0526), Alabama, Middle (0527), Alabama, Southern (0528), Florida, Middle (053A) (partial survey), Georgia, Northern (053E), Georgia, Middle (053G), Louisiana, Eastern (053L), Louisiana, Middle (053N), Texas, Northern (0539), Texas, Eastern (0540), Texas, Southern (0541), Texas, Western (0542), Kentucky, Western (0644), Michigan, Eastern (0645), Michigan, Western (0646), Ohio, Northern (0647), Ohio, Southern (0648), Tennessee, Western (0651), Illinois, Northern (0752), Illinois, Central (0753), Indiana, Northern (0755), Indiana, Southern (0756), Wisconsin, Eastern (0757), Wisconsin, Western (0758), Arkansas, Western (0861), Iowa, Northern (0862), Iowa, Southern (0863), Minnesota (0864), Missouri, Eastern (0865) (partial survey), Missouri, Western (0866), Arizona (0970) (partial survey), California, Northern (0971), California, Eastern (0972), California, Central (0973), California, Southern (0974), Hawaii (0975),

Oregon (0979), Washington, Eastern (0980), Washington, Western (0981), Kansas (1083), New Mexico (1084), Oklahoma, Eastern (1086), Oklahoma, Western (1087), Utah (1088), West Virginia, Northern (partial survey) (0424), Montana (partial survey) (0977).

Districts not surveyed were the following:

New Hampshire (0102), Puerto Rico (0104), Vermont (0210), Virgin Islands (0391), Florida, Northern (0527), Florida, Southern (053C), Georgia, Southern (053J), Louisiana, Western (0536), Mississippi, Northern (0537), Mississippi, Southern (0538), Canal Zone (0592), Kentucky, Eastern (0643), Tennessee, Eastern (0649), Tennessee, Middle (0650), Illinois, Southern (0754), Wisconsin, Western (0758), Arkansas, Eastern (0860), Iowa, Northern (0863), Nebraska (0867), North Dakota (0868), South Dakota (0869), Alaska (097X), Idaho (0976), Nevada (0978), Guam (0993), Northern Mariana Islands (0994), Colorado (1082), Oklahoma, Northern (1085), Oklahoma, Eastern (1086), Wyoming (1089).

( ) Indicates district number assigned by the Administrative Office of the United States Courts. "Partial survey" indicates additional cases may be added.

The patience and assistance of the personnel of the various federal courts, the Administrative Conference, and counsel are gratefully acknowledged.

Senator **Byrd** (acting chairman). Thank you, Judge Renfrew, for your very incisive, penetrating, and impressive testimony.

I believe that Judge Bell had indicated that Mr. Hahn will be next. Lest I should have to leave shortly, let me say before you begin, Mr. Hahn, that I am delighted to see our former Attorney General here today. It is a pleasure to hear him as he has appeared at the witness table.

Judge Bell, may I say that I welcome you to visit my office at any time. It is good to renew old friendships. I find myself not only reminiscing, but reminiscing somewhat sadly and with a good deal of nostalgia. I come to the conclusion that I wish you were back in the Attorney General's office.

Mr. **Bell**. Thank you, Senator.

Senator **Byrd**. I am looking forward to hearing a bit of Sam Ervin's testimony. I hope, Senator Ervin, that I will be able to hear you again. I have listened to you so many times over the years in the United States Senate as we were debating great constitutional measures. We miss you. You left a void in the United States Senate that will not soon be filled. In the event that I have to go back to the floor before you appear, just know that I go with apologies. I hope you will also stop by and visit with me before you leave town. Do come back often.

Mr. Hahn, please proceed now.

STATEMENT OF T. MARSHALL HAHN, JR., PRESIDENT, GEORGIA-PACIFIC CORP., PORTLAND, OREG.

Mr. **Hahn**. Senator Byrd, I appreciate the opportunity to testify this morning in support of the Antitrust Equal Enforcement Act, S. 995, and also in support of applying the claim reduction provisions of this bill to cases that are pending on the date of its enactment.

As has been indicated, I am president of Georgia-Pacific Corp., and my testimony this morning is on behalf of Georgia-Pacific Corp., a victim of the present law. However, my testimony also represents my personal firmly held convictions on this important issue.

I feel that this committee has upheld the finest traditions of the U.S. Senate in undertaking to resolve the questions of contribution and claim reduction in so-called price-fixing cases. The time and effort devoted to what are clearly complicated and difficult questions by this committee have been truly commendable.

Since I am not a lawyer, I will not speak to the legal niceties involved in whether the claim reduction provisions of S. 995 may be applied to pending cases. I note, however, that in the past, as the distinguished prior witness has pointed out, Congress has frequently applied new antitrust statutes to pending cases. Based upon this, I conclude that it must be entirely appropriate to apply a new antitrust statute to pending cases.

In my view, there are three practical business reasons for applying the claim-reduction provisions of S. 995 to pending cases. First, the present rule for calculating damages in price-fixing cases is grossly unfair and should be changed. The present rule is just as unfair in pending cases as it will be in future cases. There is no justification for drawing an artificial distinction among price-fixing cases based on the happenstance of a date of enactment.

I believe the chairman of this committee put this matter in a nutshell in his statement introducing S. 995 when he said, "S. 995 will introduce a much needed element of fairness into the process of determining who should be responsible for paying bona fide antitrust damages and in what amount." The element of fairness is certainly missing in pending price-fixing cases. What is fair in a future case is fair in a pending case.

Second, as has also already been pointed out, there are today hundreds of price-fixing cases across this Nation in which hundreds of American companies are being victimized by the present unjust rules of liability. Many of these defendants are small, independent businesses such as automobile dealers and service stations.

In fact, over 900 companies are presently involved in pending cases. These parent companies include more than 5,000 subsidiaries in almost every State in the Nation. If claim reduction is not applied in these pending cases, these hundreds of companies will be subjected to a harsh injustice without reason.

Third, in the hundreds of pending price-fixing cases there will be massive transfers of capital that will weaken American business unless the claim-reduction provisions of S. 995 are applied to pending cases. Given the present state of our economy, this is not a wise decision.

The claim-reduction provisions of S. 995 will prevent sweetheart settlements that shift huge liability to a few defendants who many times are less culpable and almost always have done no greater wrong. This shift of liability is contrary to the public interest because it weakens economically a few companies in an industry only on the irrational basis that they exercised their right to establish their innocence.

Claim reduction would correct this irrationality by equitably spreading liability more evenly throughout the industry. If claim reduction is not applied to pending cases, then this serious economic inefficiency, which in itself can be anticompetitive, will continue for many years to come. Our economy cannot afford this delay.

In summary, the claim-reduction provisions of S. 995 should be applied to pending cases because this would be fair and because hundreds of American companies are being victimized in pending cases and, finally, because economic efficiency demands it.

What are the objections to applying claim reduction in pending cases? The opponents of applying claim reduction to pending cases have asserted really only two practical objections. The first is that to apply claim reduction in a pending case would be unfair to the plaintiffs. The second is that it would be too complicated. Neither of these objections bears up under close examination.

Here I will mention but not discuss a third objection which is now moot. I have reference to possible impact on settlements already agreed to in pending cases. The amendment we support would foreclose the possibility that any existing settlements might be disturbed.

The first objection rests on the assumption that the plaintiffs have relied on the old rule of calculating damages and that to adopt claim reduction would result in the plaintiffs receiving less money in total. This would be true, however, only if the plaintiffs have entered into so-called sweetheart settlements. If the plaintiffs settle for a fair amount with each settling defendant, then claim reduction would not lower the total amount received by the plaintiffs.

It seems clear to me that if two defendants each cause $10 worth of damage, the plaintiff cannot settle with one defendant for $1 and then grumble that it is unfair to prevent him from collecting $19 from the remaining defendant. Yet this is exactly the substance of the first objection to applying claim reduction in pending cases.

The second objection to applying claim reduction in pending cases is that it would be too complicated. This objection, too, lacks any basis. Claim reduction is only a rule for calculating damages. It will not create a new cause of action, nor generate new lawsuits. The arithmetical calculation required by claim reduction is based on market share, which is an objective and easily ascertained matter of simple fact. Applying claim reduction in pending cases will not cause any new complications.

It is important to note that I do not suggest that contribution be available in pending actions. I believe the public interest would be best served by an amendment to S. 995 that would make claim reduction available in pending cases while limiting the application of contribution to future cases.

This amendment, however, should also provide that claim reduction will not be applied in any pending case where this would cause manifest injustice. Such an amendment should also include a provision that expressly protects the validity of settlements entered into before the enactment of S. 995. Of course, that is exactly the form of the amendment we support.

In conclusion, I know that Congress, including especially this distinguished committee, is seeking to be fair to all parties and to the public in considering this legislation. If claim reduction is limited to future cases, I believe the result will be unjust. For this reason, I urge this committee to amend S. 995 to apply claim reduction to pending cases.

Thank you.

[Prepared statement of Marshall Hahn follows:]

PREPARED STATEMENT OF MARSHALL HAHN

Mr. Chairman, Members of the Committee on the Judiciary:

I appreciate the opportunity to testify this morning in support of the Antitrust Equal Enforcement Act, S. 995, and also in support of applying the claim reduction provisions of this bill to cases that are pending on the date of its enactment.

I am President of Georgia-Pacific Corporation. My testimony this morning is on behalf of Georgia-Pacific Corporation, a victim of the present law, but my testimony also represents my personal, firmly-held convictions on this important issue. I feel that Senator Thurmond and the members of this Committee have upheld the finest traditions of the United States Senate in undertaking to resolve the questions of contribution and claim reduction in price-fixing cases. The time and effort devoted to these complicated and difficult questions by this Committee have been truly commendable.

Since I am not a lawyer, I will not speak to the legal niceties involved in whether the claim reduction provisions of S. 995 may be applied to pending cases. I note, however, that in the past Congress has frequently applied new antitrust statutes to pending cases, and based upon this I conclude that it must be entirely appropriate to apply a new antitrust statute to pending cases.

In my view, there are three practical, business reasons for applying the claim reduction provisions of S. 995 to pending cases:

First, the present rule for calculating damages in price-fixing cases is grossly unfair, and should be changed. The present rule is just as unfair in pending cases as it will be in future cases. There is no justification for drawing an artificial distinction among price-fixing cases based on the happenstance of a date of enactment.

Mr. Chairman, I believe you put this matter in a nutshell in your statement introducing S. 995, when you said that "[S. 995] will introduce a much needed element of fairness into the process of determining who should be responsible for paying bona fide antitrust damages and in what amount." The element of fairness is certainly missing in pending price-fixing cases. What is fair in a future case is fair in a pending case.

Second, there are today hundreds of price-fixing cases across the nation in which hundreds of American companies are being victimized by the present unjust rules of liability. Many of these defendants are small, independent businesses such as automobile dealers and service stations.* If claim reduction is not applied in these pending cases, these hundreds of companies will be subjected to a harsh injustice without reason.

Third, in the hundreds of pending price-fixing cases there will be massive transfers of capital that will weaken American business unless the claim reduction provision of S.995 are applied to pending cases. Given the present state of our economy, this is not a wise decision. The claim reduction provisions of S.995 will prevent "sweetheart" settlements that shift huge liability to a few defendants, who many times are less culpable and almost always have done no greater wrong. This shift of liability is contrary to the public interest because it weakens economically a few companies in an industry only on the irrational basis that they exercised their right to establish their innocence. Claim reduction would correct this irrationality by equitably spreading liability more evenly throughout the industry. If claim reduction is not applied to pending cases, then this serious economic inefficiency which in itself can be anticompetitive, will continue for many years to come. Our economy cannot afford this delay.

In summary, the claim reduction provisions of S.995 should be applied to pending cases because this would be fair; and because hundreds of American companies are being victimized in pending cases; and finally because economic efficiency demands it.

Now, what are the objections to applying claim reduction in pending cases? The opponents of applying claim reduction to pending cases have asserted really only two practical objections: the first is that to apply claim reduction in a pending case would be unfair to the plaintiffs, and second that it would be too complicated. Neither of these objections bears up under close examination. Here I will mention but not discuss a third objection which is now moot. I have reference to possible impact on settlements already agreed to in pending cases. Amendments have been proposed which would foreclose the possibility that any existing settlements might be disturbed.

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*Note: At this point we may want to cite statistics from the current survey of pending cases now underway.

The first objection rests on the assumption that the plaintiffs have relied on the old rule of calculating damages, and that to adopt claim reduction would result in the plaintiffs receiving less money in total. This would be true, however, only if the plaintiffs have entered into so-called "sweetheart" settlements. If the plaintiffs settle for a fair amount with each settling defendant, then claim reduction would not lower the total amount received by the plaintiffs.

It seems clear to me that, if two defendants each cause ten dollars worth of damage, the plaintiff cannot settle with one defendant for one dollar and then grumble that it is unfair to prevent him from collecting nineteen dollars from the remaining defendant. Yet this is exactly the substance of the first objection to applying claim reduction in pending cases.

The second objection to applying claim reduction in pending cases is that it would be too complicated. This objection lacks any basis. Claim reduction is only a rule for calculating damages. It will not create a new cause of action, nor generate new lawsuits. The arithmetical calculation required by claim reduction is based on market share, which is an objective and easily ascertained matter of simple fact. Applying claim reduction in pending cases will not cause new complications.

It is important to note that I do not suggest that contribution be available in pending actions. I believe the public interest would be best served by an amendment to S.995 that would make claim reduction available in pending cases, while limiting the application of contribution to future cases. The amendment, however, should provide that claim reduction will not be applied in any pending case where this would cause manifest injustice. Such an amendment should also include a provision that expressly protects the validity of settlements entered into before the enactment of S.995.

In conclusion, I know that Congress, including especially this distinguished Committee, is seeking to be fair to all parties, and to the public, in considering this legislation. If claim reduction is limited to future cases, the result I believe will be unjust. For this reason, I urge this Committee to amend S.995 to apply claim reduction to pending cases.

Marshall Hahn
President,
Georgia-Pacific Corporation

Senator **Byrd**. Thank you, Mr. Hahn.

Judge Ervin, welcome back home.

Judge Ervin comes from the State the motto of which is "to be rather than to seem."

STATEMENT OF SAM J. ERVIN, JR., FORMER U.S. SENATOR, MORGANTON, N.C.

Mr. **Ervin**. Thank you, Senator Byrd.

Gentlemen, in the interest of time, I would like to ask that two documents be printed in full in the record. The first is a letter which I wrote to the chairman of the committee on February 5, 1982, to accompany a prepared statement to each member of the committee. I would like to ask that this letter and the prepared statement be printed in full.

Senator **Byrd**. Without objection, it is so ordered. The statement will appear after your remarks.

[Aforementioned letter follows:]

SAM J. ERVIN, JR.
P. O. BOX 69
MORGANTON, NORTH CAROLINA 28655

REA CODE 704
437-5532

February 5, 1982

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

In re: S. 995

Dear Strom:

Sometime ago I furnished you and other members of the Senate Judiciary Committee with copies of my statement which expresses my abiding conviction that Congress has plenary power under the Constitution to enact S. 995 providing for contribution for non-settling defendants in anti-trust cases and making its provisions apply to pending as well as future cases.

At the time I formulated these statements, some lawyers maintained that non-settling defendants had the right of contribution against their co-defendants under existing law or in the alternative that the federal judiciary could create that right under existing law if it did not already exist. On May 26, 1981, the Supreme Court handed down its decision in Texas Industries v. Radcliff Materials which rejected both of these propositions, adjudged that the right of contribution would never exist unless it was created by new congressional legislation, and recommended to Congress, in substance, that it consider such new legislation.

Since this decision makes it obvious that congressional action is essential to give the right of contribution to non-settling defendants against their co-defendants, it makes it essential for Congress to take action and prompts me to send you and each member of the Senate Judiciary Committee a revised statement setting forth my abiding conviction that Congress has the plenary power under the Constitution to do this and make it applicable to pending as well as future cases.

S. 995 and proposed amendments to it will do exactly that in a wise way. Without such new legislation, many plaintiffs seeking treble damages and attorney fees against multiple defendants in price-fixing cases under the anti-trust laws as amended by the Clayton Act abuse the salutory purpose which prompted Congress to enact these laws in their present form. They bribe wrongdoers by "sweetheart" settlements in comparatively small amount grossly disproportionate to their participation in the price-fixing, and they blackmail other defendants into making exorbitant settlements grossly disproportionate to their limited participation in price fixing by threatening to hold them responsible for all the treble damages and lawyer fees not covered by the "sweetheart" settlements made with favored substantial defendants. Indeed, in many cases, they even extort exorbitant settlements by this threat from defendants who have not participated in anyway in the price-fixing.

By so doing, they thwart the purpose of the laws. This is true because they impair the capacity of defendants of limited resources to compete with them and others and even drive some of them out of existence.

S. 995 attacks this problem in an exceedingly wise way. It does not impair the substantive right of a plaintiff to hold any or all defendants in a price-fixing arrangement for treble damages and lawyer fees, or impair in any way the validity of any settlement which a plaintiff may make with any defendant insofar as the rights of the plaintiff and the settling defendants are concerned as between themselves. S. 995 merely gives to the non-settling defendants the right to demand contribution from the other defendants proportionate to their respective participation in the price-fixing arrangement. In so doing, it merely gives the non-settling defendants a just and equitable right of contribution which is accorded by federal and state law in most other instances where joint and several liability exists on the part of the defendants to the plaintiff.

To be fair to all, S. 995 ought to make it clear that it applies to existing as well as to future cases. S. 995 should do this by expressly providing as set forth in a proposed amendment that its provisions will never apply to a pending case if the court concludes that it would be manifestly unjust to do so.

I cannot imagine a fairer or a more just way in which to prevent inexcusable abuses of a salutory congressional act.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.
Former U. S. Senator

SJE:mm
Enclosure
cc: Members of Senate Judiciary Committee

Mr. Ervin. That will remove the temptation to try to filibuster.

I want to read a short statement and then make a few extemporaneous remarks.

I am delighted to have this opportunity to testify before the Senate Judiciary Committee on the antitrust contribution and claim-reduction bill, S. 995, and specifically on the constitutionality of applying S. 995 to pending cases.

Before discussing the constitutional propriety of amending S. 995 to apply to pending cases, I would like first to say that over the years I have learned there are three things that most people are afraid of and misunderstand: first, bloodhound testimony; second, computer reports; and, third, the antitrust laws. By speaking here this morning, I have evidently managed to overcome my fear of the antitrust laws, and hopefully I will not be accused of not understanding the antitrust laws or the Constitution.

I have devoted my major efforts to the study and practice of law since that far off-day in August 1919 when I was licensed to practice. As a result of my experience I have often found that a statement on constitutional and legal issues is more illuminating if it incorporates both legal principles and plain commonsense. I will endeavor to do so.

Congress enacted the Sherman Act to insure competition and forestall the creation of monopolies. To make it effective, Congress authorized the recovery of treble damages and reasonable attorney fees by private litigants.

At the time the Sherman Act was passed, however, there were no antitrust class actions. Now class actions permit plaintiffs to sue on behalf of hundreds of thousands of purchasers throughout an industry. Under current law, plaintiffs may hold each defendant jointly and severally liable for treble damages for an entire industry regardless of whether the defendant's conduct caused one percent or 99 percent of the damages.

This has permitted plaintiffs to abuse the treble damage remedy in two ways. In the first place, they have used it to collude with certain defendants early in the litigation by settling with them for sums vastly below their proportionate contributions to the injury. In the second place, they have used it to blackmail other offenders charged with price-fixing conspiracies with threats to compel them to pay the remaining industrywide treble damages even though they were innocent of wrongdoing or their activities resulted in only a small part of the injury.

The threat of exposure to industrywide treble damages to antitrust defendants, including small innocent companies, is legally and morally reprehensible. For most companies it results in the forfeiture of the constitutionally guaranteed right to trial. It forecloses their access to the courts. It leads to an overall disrespect for the law. It permits laws designed to promote competition to be manipulated to produce anticompetitive results.

S. 995 is needed now. I urge this committee to make it applicable to pending cases with a manifest injustice exception. That is the normal rule. It is fair. There is no sound reason for not doing so. There is no constitutional impediment.

I understand this committee is considering three alternative proposals for making S. 995 apply to pending cases: first, making the bill expressly applicable to pending cases unless to do so would result in manifest injustice; second, striking paragraph 41(e); and, third, making contribution available in future cases and claim reduction available in pending cases.

Each of these proposed alternatives would apply S. 995 to pending cases, except where manifestly unjust. Congress has the undoubted constitutional power to decide that the remedial benefits of S. 995 are needed and should be available in pending cases.

Some opponents of amending S. 995 have asserted that it would be unconstitutional to make contribution and claim reduction available in pending cases on three grounds: first, that such action would violate the due process clause of the fifth amendment; second, that it would impair the obligations of contracts between plaintiffs and settling defendants; and, third, that it would violate the doctrine of separation of powers. These objections are totally without merit as is shown by numerous decisions of the Supreme Court and other Federal courts cited in my statement.

The power of Congress to apply legislation to pending cases is, of course, subject to due process requirements, but the proposed amendments to S. 995 remove all due process concerns. The manifest injustice exception guarantees that S. 995 will be applied on a case-by-case basis in a manner which comports with due process principles.

As a practical matter, Congress would certainly not violate the due process clause by applying S. 995 to pending cases. When all the discussions about due process are stripped of their surplusage, the due process clause is designed to make certain that the Federal Government will not deal unfairly with any person. Instead of violating the due process clause, applying S. 995 to pending cases will implement in a magnificent way the due process clause which is designed to promote fairness rather than unfairness. In the final analysis, it is simply the right and moral thing to do.

Congress routinely applies statutes to pending cases so that once a problem is identified its solution can be immediately implemented. Indeed, Congress today could abrogate the treble damage provision of the Clayton Act or could repeal the antitrust laws altogether. If Congress did so, plaintiffs in pending cases would have no constitutional basis to claim that they have been deprived of property without due process of law.

A plaintiff's claim to a penalty provided by Congress, such as private treble damages, may be terminated at the will of Congress. In this respect, like the Almighty, what Congress gives Congress can take away.

The objection that applying S. 995 to pending cases would impair the obligations of contracts is totally without validity. By its express terms the contract clause applies to the States only, not to Federal legislation passed by the Congress.

Now I would like to make some extemporaneous statements on this question. The notion that the separation of powers doctrine in some way disables Congress from legislating if it has ever passed a law and a suit that is based on that law is pending anywhere in the United States is an absurdity.

The doctrine of the separation of powers as applied to the Federal Government means simply that Congress has all of the legislative power given to the Federal Government, that the President has a duty to execute the laws Congress passes, and that the courts have the power to interpret those laws.

The notion that somehow to apply S. 995 to pending cases would be a violation of the doctrine of separation of powers by transgressing on the authority of courts to make a judicial decision is ridiculous. The only case I have seen cited by any opponents is the *Klein* case.

The *Klein* case is a very unusual case. The difference in the *Klein* case is that Congress undertook to tell the courts to give a false interpretation to the Constitution.

In the days of the Civil War, those of us who wore ourselves out fighting the Yankees were legislated against by Congress. They passed a law to forfeit our cotton. After we had worn ourselves out beating the devil out of the Yankees and lost the war, the kindhearted Presidents began to issue pardons to some Confederates who had cotton which would otherwise be forfeited.

Of course they said that the constitutional power of the President to pardon a person wiped out his iniquity and made it as if his crime had never been committed. The majority of Congress did not like that so they passed a law that said whenever a former Confederate sympathizer whose cotton was sought to be forfeited pleaded a Presidential pardon, the court had to hold that a Presidential pardon did not wipe out his iniquity and give a false interpretation to the Constitution. That is as alien to this case as my peculiar style of pulchritude is to the beauty of the Queen of Sheba.

In addition, I have cited many cases, but one that is as full of common sense as well as constitutional wisdom is a district court decision in *Bay Guardian Company*. That is what the situation would be if S. 995 were applied to pending cases.

In that case it was the Newspaper Preservation Act. The plaintiff said:

> Before you passed this law I could have sued the defendant for a violation of the antitrust laws. However, you passed the Newspaper Preservation Act and abolished the provisions under which I could sue. You said that failing newspapers could merge some of their functions and that would be removed from liability under the antitrust laws.

They said they had a vested right to keep the law unchanged. The court said:

> Plaintiffs had nothing other than an expectation that a given rule of law would remain the same; there is no vested right in the continuation of such a rule of law.
>
> In addition, this Court knows of no case, and the plaintiffs have cited none, which holds that Congress is prohibited from changing or repealing legislation. That is all that has been done in this case. Congress has decreed that certain portions of the antitrust laws will no longer apply to certain types of newspapers. To insure uniformity Congress specified that the exemption will apply to all pending cases. This does not violate any constitutional provision of which the Court is aware.

I would like to have this decision included in the record.[1]

As to the notion that applying S. 995 to pending cases would in some way impair the obligations of contracts, the Constitution of the United States does not prohibit Congress from impairing the obligations of contracts. It only applies that provision to the States. This is well illustrated by the following case.

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[1] Decision may be found on page 309.

In *Norman* v. *Baltimore & Ohio Railroad*, when during the early days of the Franklin D. Roosevelt administration Congress passed a law providing that contracts payable in gold should no longer be payable in gold but would be payable by ordinary legal tender, the Supreme Court held that wherever Congress has the power to regulate a field of contract law, its power is plenary insofar as it does so, and that it had the power to nullify the obligation of private contracts between individuals obligating them to make payments of bonds in gold. That is a good illustration of this point. It was also said in many cases that the legislative power of Congress under the Constitution is absolute.

Going to the third constitutional objection that has been urged, that is due process, which we sometimes refer to as manifest injustice—I like those words manifest injustice, but you cannot quite put your teeth in them like you can in what the decisions really hold—starting in 1801 in the case of *United States* v. *Schooner Peggy*, the court held that Congress had plenary power to make a change in the law apply to a case which arose or was even decided before the change in the law was made. Unless Congress expressly provided or its legislative history showed that it did not intend to apply existing law, it always applied to existing law unless the act of Congress so providing is unconstitutional. That usually goes to a due process question because when Congress legislates either prospectively or retrospectively it is obligated to observe due process.

The cases, starting with the case I cited and coming down through many other cases including *Bradley* v. *Richmond School Board*, *Cort* v. *Ash* and a decision of Judge Hand which is cited in my written statement—say in effect that a new act of Congress applies to an existing case if Congress intends unless it is manifestly unjust. That means in these cases unconstitutional. There is nothing unconstitutional about this.

I would like to try to answer a question which the chairman put to Judge Bell. Congress had a salutory purpose in passing the antitrust law and the Clayton Act. It was to promote competition and prevent monopolies, but the act has been perverted by plaintiffs.

The result is that plaintiffs under the existing law can practice legalized bribery, can practice legalized blackmail, and can practice legalized extortion by settling with or giving a sweetheart contract to one offender, letting him go scot-free on the payment of a small fraction of his contribution to the price fixing, and then hold others responsible for his share.

Under the present law, as I understand it, you have a claim reduction principle, but that claim reduction principle in most of the cases is only based on the actual amount of the settlement. This bill goes beyond that.

It prevents or discourages the making of these sweetheart contracts because it says you can have whichever is the greater, and wherever a plaintiff gives a sweetheart contract to one of the defendants the claim reduction credit must be equivalent to treble the amount of the damages for which the settling defendant who is given the sweetheart contract is responsible. That would not be obviated by a simple amendment saying the existing claim reduction principle only should be applied.

I think that answers the chairman's question because now the plaintiff has no right to complain about this law. In making S. 995 apply to pending cases, they can still recover treble damages of every defendant by holding them all jointly and severally liable. That is not affected at all.

This claim reduction feature only says in effect that if the plaintiff makes a sweetheart contract and lets one of the culprits escape his just liability you have a claim reduction feature and you credit the plaintiff's claim with the treble damages caused by the defendant with whom he makes the sweetheart contract. It does not affect his rights against any of the other defendants. He can still sue each one of them for treble damages and counsel fees for their proportionate contribution to the price fixing. He will not lose a single right under this bill unless he makes a sweetheart contract.

It is necessary to make this bill apply to pending cases, at least in the claim reduction feature, in order to obviate the temptation of plaintiffs—it is a temptation that has come to the fore all to often—to pervert the salutory principle of the antitrust laws in order, as I say, to practice legalized bribery through a sweetheart contract recipient, coercion in threatening to hold the others responsible for all the rest of the treble damages although they may have contributed only a small percent to the responsibility, and certainly legalized blackmail ought to be removed by an act of Congress.

I would be glad to try to answer any questions. I may have to plead ignorance. I promise not to plead the fifth amendment.

The CHAIRMAN. Thank you, Senator.

In a few minutes we will probably call all of you back up for questions.

Senator EAST. Excuse me, Mr. Chairman, I would like to make one comment to the Senator from North Carolina.

The CHAIRMAN. Yes.

Senator EAST. It is a great honor and distinction to have this gentleman here. I would say happily publicly that he is the most revered public figure in the State of North Carolina. It is an honor to have him here.

Mr. ERVIN. I am deeply grateful to my fellow tarheel for that tribute. Thank you.

[Prepared statement of Hon. Sam J. Ervin, Jr. follows:]

PREPARED STATEMENT OF

SAM J. ERVIN, JR.

I am delighted to have this opportunity to testify before the Senate Judiciary Committee on the antitrust contribution and claim reduction bill ("S. 995") and, specifically, on the constitutionality of applying S. 995 to pending cases. This is remedial legislation. It is needed to correct grave injustices.

Before discussing the constitutional propriety of amending S. 995 to apply to pending cases, I would like first to say that over the years I have learned that there are three things that most people are afraid of and misunderstand: (1) bloodhound evidence, (2) computer reports, and (3) the antitrust laws. By speaking here this morning, I have evidently managed to overcome my fear of the antitrust laws, and hopefully I won't be accused of not understanding the antitrust laws or the Constitution.

I have devoted my major efforts to the study and practice of law since that far-off day in August 1919 when I was licensed to practice. As a result of my experience since that time, I have often found that a statement on constitutional and legal issues is more illuminating if it incorporates both legal principles and plain common sense. I will endeavor to do so.

Congress enacted the Sherman Act to insure competition and to forestall the creation of monopolies. To make it effective, Congress authorized the recovery of treble damages and reasonable attorney's fees by private plaintiffs. Under current judicially created law, each party to a civil price-fixing conspiracy is jointly and severally liable because Congress has thus far failed to do in the antitrust area what other federal and state laws do with respect to such liability, i.e., to allow contribution and claim reduction among parties.

At the time the Sherman Act was passed, there were no antitrust class actions. Now, class actions permit plaintiffs to sue on behalf of hundreds of thousands of purchasers throughout an industry. Thus, unless an amended S. 995 is enacted, plaintiffs may hold any party to a price-fixing conspiracy responsible for treble damages for an entire industry (subject only to a deduction of funds received under settlement agreements) regardless of whether such party's activities caused 1 percent or 99 percent of the damages. This is fundamentally wrong.

Plaintiffs have abused the treble damage remedy in two ways. In the first place, they have used it to collude with certain defendants early in the litigation by settling with them for sums vastly below their proportionate contributions to the injury; and in the second place, to blackmail other offenders charged with price-fixing conspiracies with threats to compel them to pay the remaining industry-wide treble damages, even though they were innocent of wrongdoing or their activities resulted in only a small part of the injury. One example of this occurred in the Folding Carton litigation. Plaintiffs' counsel previously testified before this Committee that a $500,000 settlement payment was demanded from Georgia-Pacific Corporation even though plaintiffs did not have any evidence of wrongdoing by that company.[1] While some may not think that is much money, it is wrong to extract any money, even in settlement, from a party known to be innocent.

The threat to innocent parties and to small offenders can destroy their credit or compel them to go out of business, thus actually decreasing the competition the Clayton Act was enacted to insure. For example, in the Corrugated Container litigation, U.S. Corrugated Fibre-Box Company was forced to close a plant and lay off 200 workers to raise the money to meet plaintiffs' lawyers' settlement demands.[2] Such a result is inimical to competition. The antitrust laws are undermined.

There are cases pending today in which companies are being unfairly exposed to claims for billions of dollars in damages based upon the sales of their competitors which previously settled. In the Plywood litigation, plaintiffs claim that Georgia-Pacific, Weyerhaeuser and Willamette could be liable for industry-wide damages, yet plaintiffs' lawyers perceived their case to be so weak and tenuous that they settled with a majority of the industry for less than $8 million. Indeed, the Ninth Circuit Court of Appeals held that the underlying conduct, which was the basis of the private cases, did not even violate the FTC Act.[3]

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[1] The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess., at 108 (1979).

[2] Supplemental Statement of U.S. Corrugated Fibre-Box Company In Support of Approval of Proposed Settlement, In re Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D. Tex.), April 24, 1979, at 2.

In the Corrugated Container litigation, The Mead Corporation may be exposed to potential claims of hundreds of millions of dollars, even though it has only 2-1/2% of the market, was acquitted in a related criminal case, and plaintiffs have already been made whole by their settlements with other defendants.[4]

If the law permits these results, it would be an outrage. It would be nothing more than a setup for legalized blackmail of every industry in America.

The threat of exposure to industry-wide treble damages to antitrust defendants--including small, innocent companies--

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[3] Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[4] In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. ¶ 64,114, at 76,701 (S.D. Tex.), aff'd, 659 F.2d 1322 (5th Cir. 1981).

is legally and morally reprehensible. For most companies, it results in the forfeiture of the constitutionally guaranteed right to trial. It forecloses their access to the courts. It leads to extortion of settlements unrelated to culpability or market share. Moreover, it leads to an overall disrespect for the law. It permits laws designed to promote competition to be manipulated to produce anticompetitive results.

S. 995 would amend the Clayton Act to provide for a right to contribution among antitrust defendants who have not settled treble damage cases and claim reduction with respect to settling defendants. It also expressly releases settling defendants from contribution claims. This legislation is needed now. I urge this Committee to make it applicable to pending cases with a manifest injustice exception. That is the normal rule. It is fair. There is no sound reason for not doing so. There is no constitutional impediment.

I understand that this Committee is considering three alternative proposals for making S. 995 apply to pending cases: (1) making the bill expressly applicable to pending cases unless to do so would result in manifest injustice;[5] (2) striking subparagraph 4I(e);[6] and (3) making contribution available in future cases and claim reduction available in pending cases.[7] Each of these proposed alternatives would apply S. 995 to pending cases, except where manifestly unjust. Congress has the undoubted constitutional power to decide that the remedial benefits of S. 995 are needed and should be available in pending cases with that exception.

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[5] *See* The Antitrust Equal Enforcement Act of 1981, H.R. 1242.

[6] *See* *Bradley* v. *Richmond School Board*, 416 U.S. 696, 715 (1974).

Some opponents of amending S. 995 at one time asserted that it would be unconstitutional to make contribution and claim reduction available in pending cases. Specifically they alleged that Congress lacks the power to amend an unfair law by adopting an amended S. 995 on these grounds:

1. That such action would violate the due process clause of the Fifth Amendment.

2. That it would impair the obligations of contracts between plaintiffs and settling defendants.

3. That it would violate the doctrine of separation of powers.

These objections are totally without merit.

Congress frequently enacts laws that apply to pending cases. Legislation is usually silent as to applicability to pending cases, thereby permitting the courts to apply the normal rule that a new statute is to be applied to a pending case unless it would be manifestly unjust to do so.[8] Often statutes expressly state they are applicable without delay.

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[7] See "Proposed Compromise" language.

The antitrust laws are no exception.[9] Where challenged, the courts have upheld application of these statutes in pending cases.[10] In areas other than antitrust, the Congress, on innumerable occasions, has passed statutes that apply immediately, often expressly stating that they apply to pending cases.[11] The United States Supreme Court has consistently upheld the constitutionality of applying new statutes to pending cases.[12]

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[8] E.g., Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978); Cort v. Ash, 422 U.S. 66, 77 (1975); Hastings v. Earth Satellite Corp., 628 F.2d 85, 92 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980); United States v. Elrod, 627 F.2d 813, 819 (7th Cir. 1980); American Jewish Congress v. Kreps, 574 F.2d 624, 626-27 (D.C. Cir. 1978).

[9] E.g., 15 U.S.C. § 26 (1978); (The Hart-Scott-Rodino Antitrust Improvements Act); 15 U.S.C. § 3501 (1980) (The Soft Drink Interbrand Competition Act); 15 U.S.C. § 1804(b) (1976) (The Newspaper Preservation Act); 15 U.S.C. § 15 (1976) (1955 amendment to Clayton Act's statute of limitations); 15 U.S.C. § 29 (1976) (direct appeal of certain antitrust cases to Supreme Court).

[10] See Coca-Cola Co. v. FTC, 642 F.2d 1387, 1390 (D.C. Cir. 1981); Alphin v. Henson, 552 F.2d 1033 (4th Cir.), cert. denied, 424 U.S. 823 (1977); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608 (2d Cir.), cert. denied, 363 U.S. 811 (1960); Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

The power of Congress to apply legislation to pending cases is, of course, subject to due process requirements,[13] but the proposed amendments to S. 995 remove all due process concerns. The manifest injustice exception guarantees that S. 995 will be applied on a case-by-case basis in a manner which comports with due process principles.

The application of S. 995 to pending cases would conform to the well-established rule that legislation usually applies to pending cases unless manifest injustice would result.[14]

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[11] E.g., 28 U.S.C. § 1331 (Supp. 1981); 25 U.S.C. § 640d-27 (Supp. 1981); 19 U.S.C. § 1303 (1976); 12 U.S.C. § 1904 (1976); 28 U.S.C. § 1346 (1970); 18 U.S.C. § 4202 (1970); 18 U.S.C. § 4251 (1970); 42 U.S.C. § 405 (1970); 42 U.S.C. § 423 (1970); 28 U.S.C. § 1491 (1940).

[12] E.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Carpenter v. Wabash Railway, 309 U.S. 23 (1940); Funkhouser v. J.B. Preston Co., 290 U.S. 163 (1933).

[13] See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

[14] Thorpe v. Housing Authority, 393 U.S. 268 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Applying a change in the law to a case pending on appeal in Gulf Offshore Co. v. Mobil Oil Co., 101 S. Ct. 2870, 2879 n.16 (1981), the Supreme Court succinctly stated:

> Here, we address a change in the law occurring while the case is on direct appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281

This is the rule even when a statute does not expressly state that it applies to pending cases.[18]

As a practical matter, Congress would certainly not violate the due process clause by applying S. 995 to pending cases. When all the discussions about due process are stripped of their surplusage, the due process clause is designed to make certain that the federal government will not deal unfairly with any person. Instead of violating the due process clause, applying S. 995 to pending cases will implement in a magnificent way the due process clause which is designed to promote fairness rather than unfairness. In the final analysis, it is simply the right and moral thing to do.

S. 995 does not create any new substantive violation of the antitrust laws. It does not change any substantive element for any violation of the antitrust laws. It does not make any conduct unlawful. Plaintiffs will continue to be able

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[Footnote continued]

> (1969); see United States v. Schooner Peggy, 1 Cranch 103 (1801). While there well might be an exception to the rule to prevent "manifest injustice," Bradley v. Richmond School Board, 416 U.S. 696, 717 (1974), this equitable exception does not reach a private civil suit where the change does not extinguish a cause of action. . . .

[18] Bradley v. Richmond School Board, 416 U.S. 696, 715 (1974); Cort v. Ash, 422 U.S. 66, 76-77 (1975); Eikenberry v. Callahan, 653 F.2d 632, 635 (D.C. Cir. 1981).

to seek treble damages. The legislation deals solely with antitrust remedies. No defendant would become liable for damages unless its conduct was unlawful under existing antitrust statutes. As recognized in Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), contribution is a remedial measure which allocates damages for conduct previously specified as a violation of the antitrust laws.

It is altogether proper to apply legislation to pending cases, especially where a new statute changes a statutory remedy only.[16] Indeed, under the criminal law, new legislation which abates a penalty must be applied to pending cases.[17] A party in a pending case has "no property, in the constitutional sense, in any particular form of remedy."[18] He also has no vested right to prevent Congress from adjusting a remedy prior to the final adjudication of his lawsuit.[19]

Moreover, it is preposterous to say that Congress cannot apply "substantive" statutes to pending cases. Congress does this routinely so that once a problem is identified its solution can be immediately implemented. Indeed, Congress today could abrogate the treble damage provision of the Clayton Act or could repeal the antitrust laws altogether. If Congress did so, plaintiffs in pending cases would have no constitutional basis to claim that they have been deprived of property without due process. A plaintiff's claim to a penalty provided by Congress--such as private treble damages--may be terminated at the will of Congress.[20] In this respect like the Almighty, what Congress gives Congress can take away.

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[16] United States v. Vanella, 619 F.2d 384 (5th Cir. 1980); Bush v. State Industries, Inc., 599 F.2d 780 (6th Cir. 1979); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

[17] Bell v. Maryland, 378 U.S. 226 (1964).

[18] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).

[19] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

The objection that applying S. 995 to pending cases would impair the obligations of contracts is totally without validity. Article 1, Section 10 of the United States Constitution provides that "No State shall . . . pass . . . any . . . Law impairing the Obligation of Contracts." By its express terms, the Contract Clause applies to the states only, not to federal legislation passed by the Congress.[21]

To be sure, there are some decisions which intimate that the due process clause absorbs into its provisions in some cases a prohibition upon the impairment of contracts.[22] These cases have no pertinence here. Congress has passed laws impairing the obligations of contracts, such as it did when it abolished the gold standard and relieved private parties of the obligation to pay bonds in gold according to their original provisions rather than in legal tender currency.[33]

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[20] Maryland v. Baltimore & Ohio Railroad, 44 U.S. (3 How.) 534 (1845).

[21] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 257 (1978) (dissenting opinion); New York v. United States, 257 U.S. 591, 601 (1922).

[22] As shown above, this legislation does not violate due process. In Lynch v. United States, 292 U.S. 571 (1934),

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[Footnote continued]

which has been cited by opponents of an amended S. 995, the Court properly decided that the United States could not renege on its obligations in federal insurance contracts with private individuals simply to save money. The Court held that valid contracts of insurance between the United States and private individuals created vested contract rights against the United States protected by the Due Process Clause of the Fifth Amendment which could not be repudiated simply to reduce government expenditures where Congress was not exerting its police or other powers. Lynch has no application here. An amended S. 995 would not abrogate any contractual obligations. While settlements in pending cases may create vested rights between the signatory parties, they do not create any entitlements to future judgments for treble damages against nonsettling defendants or anyone else. Settlements bind only the settling parties, whose vested rights are fully protected by this legislation.

[33] Norman v. Baltimore & Ohio Railroad, 294 U.S. 240 (1935). Of course, consistent with Lynch, the Supreme Court in Perry v. United States, 294 U.S. 330 (1935), rightly determined that the Congressional abolition of the gold standard did not "alter or destroy" federal gold bonds, which were federal contractual obligations "binding upon the conscience of the sovereign." Id. at 353-54. In so holding, the Court stated that "[t]here is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . ." Id. at 350-51. Indeed, "[t]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate [private] contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt." Norman v. Baltimore & Ohio Railroad, 294 U.S. 240, 309-10 (1935).

The constitutional power of Congress to enact legislation which affects existing contracts has been consistently upheld by the United States Supreme Court.[24] Furthermore, S. 995 and its legislative history could expressly provide that no contract of settlement between a plaintiff and a settling defendant will be set aside as a result of permitting rights of contribution and claim reduction in pending cases.

There is no merit in what the opponents of S. 995 have to say about "retroactivity." First, applying S. 995 to pending cases is not retroactive legislation. It would allow contribution and claim reduction to be applied prospectively in pending cases. No finally adjudicated case would be affected. Second, even though some may view an amended S. 995 as retroactive, Article I, Section 10 of the Constitution, which prohibits the passage of _ex post facto_ laws by Congress, applies only to retroactive criminal legislation,[25] and has no application here. Third, while there is much discussion relating to retroactive laws in decisions, it is to be noted that virtually every act of Congress has a retroactive origin. This is true simply because Congress always enacts laws to remedy conditions revealed by past events. Retroactive acts of Congress are not unconstitutional unless they nullify a vested right.

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[24] _E.g._, _Norman_ v. _Baltimore & Ohio Railroad_, 294 U.S. 240, 310 (1935); _United States_ v. _Southern Pacific Co._, 259 U.S. 214 (1922); _Philadelphia Baltimore & Washingon Railroad_ v. _Schubert_, 224 U.S. 603, 613-14 (1912); _Louisville & Nashville Railroad_ v. _Mottley_, 219 U.S. 467, 485-86 (1911).

[25] _Bouie_ v. _City of Columbia_, 378 U.S. 347, 353 (1964).

No plaintiff in a Clayton Act case can ever acquire a vested right in an injustice.

A plaintiff does not have any contract right to a future judgment for punitive damages. Nor is there a vested right in a trial court judgment.[26] A judgment does not become final until "the availability of appeal [is] exhausted, and the time for petition for certiorari ha[s] elapsed. . . ."[27]

It has also been argued that it is somehow unfair to a party, who may have considered existing law in reaching a settlement, to have newly enacted legislation apply to the remaining parties in the same case. But, there has been no such reliance. Contribution and claim reduction have been asserted for years.[28] Indeed, in the Corrugated Container litigation, defendants asserted those rights before a single settlement was finally approved by the district court. In that case, plaintiffs' counsel specifically urged approval of the settlements even if such rights were later permitted in that litigation.[29] Parties settle cases for a variety of reasons--e.g., the risk of an adverse verdict; the costs of litigation; the desire for an ice-breaker settlement; the benefits of cooperation clauses; and so forth. At all times, however, parties who settle a case have no vested right to rely on future congressional action or inaction affecting those factors which they considered when reaching their settlement agreement.[30] Congress has the authority to eliminate treble damages altogether. I do not believe that two private parties can make a contract to limit the power of Congress to legislate.[31] Where the application of law is unfair, Congress can and should change the rule.

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[26] Hospital Ass'n of New York v. Toia, 435 F. Supp. 819, 829 (S.D.N.Y. 1977); Asselta v. 149 Madison Avenue Corp., 79 F. Supp. 413, 415 (S.D.N.Y. 1948).

[27] Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

[28] See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), and cases cited therein.

The argument that making S. 995 apply to pending cases would violate the doctrine of separation of powers is absurd. As a matter of constitutional law, Congress has the power to repeal the Clayton Act in its entirety, and it has the power to make any amendments to that Act--which is the creature of Congress, not a creature of the Constitution.

The doctrine of separation of powers means simply that Congress has the power to make laws, the President has the duty to execute laws, and the courts have the power to interpret laws. An act of Congress which leaves the courts free to interpret laws and does not limit their power to do so is perfectly constitutional.

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[29] Transcript of Pretrial Hearing, May 16, 1979, at 68.

[30] E.g., The Second Employers' Liability Cases, 223 U.S. 1 (1912); Chicago Burlington & Quincy Railroad v. McGuire, 219 U.S. 549 (1911); Louisville & Nashville Railroad v. Mottley, 219 U.S. 467 (1911).

[31] As stated by the Supreme Court in Norman v. Baltimore & Ohio Railroad, 294 U.S. 240, 307 (1935): "Contracts, however express, cannot fetter the constitutional authority of the Congress."

Legislation can run afoul of the separation of powers doctrine only when Congress invades the judicial province.[32] No attempt is made by S. 995 to interfere with the power of the courts to interpret the laws. Indeed, the proposed amendments specifically reserve to the courts the power not to apply S. 995 in a pending case if manifest injustice would result. An amended S. 995 would implement the constitutional doctrine that it is the duty of the courts to interpret the law as it exists at the time the interpretation is made. This statute will restore fairness by an adjustment of antitrust remedies. This is the proper province of Congress. There is no intrusion by the Congress into the judicial function which could contravene the separation of powers doctrine.[33] Indeed, a number of courts, including the United States Supreme Court, have invited Congressional guidance in this area.[34]

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[32] McCullough v. Virginia, 172 U.S. 102 (1898); United States v. Klein, 80 U.S. 128 (1872).

[33] See Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

[34] E.g., Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979), aff'd sub nom. Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

The argument that application of legislation to pending cases raises separation of powers problems has been uniformly rejected by the courts. In *King* v. *Finch*, 428 F.2d 709 (5th Cir. 1970), after the Secretary of HEW denied Social Security disability benefits, the Fifth Circuit remanded for consideration whether the claimant's medical impairments would prevent her from being hired. Congress then amended the Social Security Act to make consideration of whether a claimant would be hired irrelevant. This amendment was made applicable to pending cases and the Secretary again denied benefits. On appeal, the claimant argued, among other things, that application of the amendment to pending cases was unconstitutional because it violated the principle of separation of powers and interfered with judicial power. The Fifth Circuit flatly rejected the argument.[35]

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[35] In rejecting this argument, the Fifth Circuit held:

> [T]he Congress has changed the law, but we cannot agree with appellant that it has interfered with the judicial power. The legislation at issue affects appellant's rights (and coincidentally the rights of numerous recipients of benefits) but not the power of the federal courts to adjudicate those rights. . . . *We must reject the argument that a law that does not affect the composition, nature, jurisdiction or even procedure of the courts, but only affects the substantive rights of a litigant, violates the separation of powers under the facts of this case*. (428 F.2d at 713; emphasis added.)

If the separation of powers doctrine meant that Congress could not enact an amended S. 995, the legislative power of Congress would be stymied. Congress could not pass any bill whenever there was a case pending which involved an issue addressed by that legislation. Congress would have to check every docket in every court across the land to ascertain whether the legislation it was enacting would affect any pending case. The legislative process could be ground to a halt simply by filing a lawsuit. Obviously, such a situation could not be tolerated.

[Footnote continued]

A claim that the application of legislation to pending cases would violate the separation of powers doctrine was also rejected in Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 961 (1967). In that case, Congress modified the act of state doctrine by amending the Foreign Assistance Act of 1964 to provide that cases involving foreign expropriations be decided on the merits unless the executive branch intervened. The amendment was made applicable to pending cases, including Banco Nacional, despite an earlier decision by the Supreme Court, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which had held that the act of state doctrine prevented such a determination on the merits. The Second Circuit held that the amendment was not a legislative interference with judicial power violative of the Constitution. 383 F.2d at 181.

The opponents of applying S. 995 in pending cases lay much stress on the case of United States v. Klein, 80 U.S. 128 (1872). In that case, however, the Court rightly invalidated an act of Congress which attempted to interfere with the power of the courts to interpret the Constitution. The act of Congress invalidated in that case required the Court, in substance, to give a false interpretation to the pardoning power of the President under the Constitution.

Thus, applying S. 995 to pending cases would be constitutionally sound. The proposed amendments do not mandate the application of S. 995 in all pending cases. Rather, the remedial benefits of S. 995 would be available for application in a pending case, except where manifestly unjust. If S. 995 adopted the manifest injustice exception, either by express language or by silence as to the legislation's application, it would be consistent with well-known constitutional principles of statutory application. This would permit the courts to determine whether fairness requires contribution and claim reduction in a particular pending case. If Congress desires to put an end to bribery and blackmail by plaintiffs in Clayton Act cases, it cannot do more so effectively than by enacting an amended S. 995. The arguments of opponents to S. 995 boil down to this--that Congress lacks the power to legislate under the Constitution by amending an act which is susceptible of abuse by plaintiffs.

I support an amended S. 995 which would apply the legislation to pending antitrust cases with an exception for manifest injustice. It is perfectly constitutional for Congress to do so. It is the right thing to do, legally and morally. I hope that my comments have been helpful to the important task before this Committee.

The BAY GUARDIAN COMPANY, a corporation, et al., Plaintiffs,
v.
The CHRONICLE PUBLISHING COMPANY, Inc., a corporation, et al., Defendants.
No. C-70-1613.

United States District Court,
N. D. California.
June 21, 1972.

ORDER DENYING MOTION TO STRIKE ANSWER

OLIVER J. CARTER, Chief Judge.

This action may best be described as one to test the constitutionality of the Newspaper Preservation Act (15 U.S.C. §§ 1801-04), (henceforth Act), which was passed July 24, 1970. The Act grants a special limited exemption from the antitrust laws to certain types of newspapers. Originally the plaintiffs sought in one section of their complaint a declaratory judgment that the Act was unconstitutional. This Court found in an order dated February 24, 1972, 340 F. Supp. 76, that such an action could not be maintained for technical jurisdiction-al reasons. Now the defendants have answered the antitrust portions of the complaint by asserting the Act in two affirmative defenses to those claims.

The plaintiffs have now moved to strike those defenses on the ground that the Act is unconstitutional on its face and as applied.

The defendants since September, 1965, have operated under a joint operating agreement. By that agreement one newspaper (News-Call-Bulletin) was put out of existence while the two remaining dailies (Examiner and Chronicle) were allotted the afternoon and morning markets respectively. All printing is done by a jointly owned subsidiary, the San Francisco Newspaper Printing Company, a named defendant. The editorial staffs of the two remaining papers, the Chronicle and Examiner, are kept independent, though they jointly publish a unified Sunday edition. Profits from all operations are pooled and shared on a 50/50 basis. Thus the defendant papers have eliminated all competition between them and have achieved a monopoly position in the San Francisco daily newspaper market, so that profits are now quite substantial.

The plaintiffs are the owners and publishers of a small paper that has been a bimonthly paper and is now monthly. They contend that the defendants' monopoly position in the San Francisco market enables the defendants to destroy or weaken any potential competition. They contend that this monopoly position accounts for the continually declining quality of the editorial and news content of both papers. They contend that the profit sharing, joint ad rates, and other cooperative aspects of the joint operating agreement enable the defendants to establish and perpetuate a stranglehold on the San Francisco newspaper market. The plaintiffs contend that the Act is unconstitutional because it unfairly encourages this journalistic monopoly.

The Act provides that newspapers in economic distress may enter into joint operating agreements. It further provides that existing joint operating agreements are also allowable if at the time an agreement was entered into one of the papers was not financially sound.

Newspapers for purposes of the Act were defined to include only those publishing one or more issues weekly. Permissible joint operating agreements are accorded an exemption from the operation of the Federal Trade Commission Act, and other antitrust acts. That exemption was specifically extended to any civil or criminal proceedings pending on July 24, 1970, the date the Act was passed.

For the purposes of ruling upon the plaintiffs' motion to strike the affirmative defenses related to the Act, the Court has assumed that the Act is applicable to the defendants' joint operating agreement. The terms of the Act provide that it is to apply to daily newspapers, no more than one of which "was likely to remain or become a financially sound publication" (§ 1803(a)). The Court offers no opinion at this time whether the defendant newspapers will be able to prove at the time of trial that they came within that definition when they began joint operations.

I. *First Amendment*

Plaintiffs contend that the Act is unconstitutional because it permits the defendant newspapers to combine so as to prevent the plaintiffs' newspaper from publishing. This effect of the Act, they contend, causes it to be in violation of the freedom of the press guarantee of the First Amendment.

The simple answer to the plaintiffs' contention is that the Act does not authorize any conduct. It is a narrow exception to the antitrust laws for newspapers in danger of failing. Thus it is in many respects merely a codification of the judicially created "failing company" doctrine. See, 83 Harv.L.R. 673 (1970).

[1] Much of plaintiffs' argument seems directed at a phantom Act which conveys a government license to monopolize to certain newspapers at the expense

of others. Whatever might be the constitutional status of such an Act, it is not the one now before us. The Act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting "predatory practices" (§ 1803(c)). The case of Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), relied on heavily by the plaintiffs, is clearly inapplicable. In that case the Supreme Court ruled unconstitutional a state taxing statute that was clearly aimed at certain large metropolitan newspapers that had opposed the political machine then in control of that state. It was a clear and obnoxious political reprisal against the press by a corrupt demagogue. There is simply no comparison between that factual situation and the one underlying the instant legislation.

[2] Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. It merely looses the same shady market forces which existed before the passage of the Sherman, Clayton and other antitrust laws.

Such a repeal, even when applicable only to the newspaper industry, does not violate the First Amendment.

II. *Equal Protection*

Plaintiffs contend that the Act confers a privileged economic status upon the defendant newspapers and thus denies the plaintiffs equal protection of the laws. (As applied to federal government through the Fifth Amendment, Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)).

The kernel of the plaintiffs' reasoning is that the Act affects First Amendment rights and thus should be subjected to a more rigorous standard of propriety, "the compelling interest" test. The Court does not believe that the cases cited by the plaintiffs provide support for these contentions.

[3] Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) involved the requirements imposed by the election laws of Ohio upon political parties wishing to secure a place on the ballot in a presidential election. The laws of the State of Ohio made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." 393 U.S., at 25, 89 S.Ct., at 8. There are no such discriminatory qualifications contained in the instant Act. It merely requires that the merged newspapers publish at least once a week and that one of the merged papers be in danger of failing. There is no political or other discrimination either on the face of the Act or in any implicit terms. Furthermore the Ohio law was one regulating the access to the ballot and the political process. The Act in question does not regulate or restrict publishing, rather it merely permits newspapers to merge when they might not otherwise have been able to do so because of the antitrust laws.

Again this Court notes that it does not express an opinion on the wisdom of the instant legislation, but only the contention that the Act violates the Equal Protection or Due Process clauses of the Constitution.

[4] As to the contention that the Act violates equal protection by establishing different qualifications for papers which had already entered into a joint operating agreement as opposed to those which had not yet made such an agreement; the Court finds that the plaintiffs are without standing to assert that argument.

[5] There is no contention that the plaintiffs have ever published more frequently than twice monthly. By the terms of the Act they would therefore not qualify for its exemption. The Court expresses the opinion, however, that it is entirely rational for Congress to decide that daily newspapers are more vital to the well being of the nation and accordingly make rules or exceptions for dailies that are not made for bimonthlies.

III. *Overbreadth*

[6] The plaintiffs contend that the Act violated the First and Fifth Amendments to the Constitution because it goes much further than would be necessary to accomplish its objective. In formulating this argument they posit that the Act imposes restraints upon the publication of their newspaper. The Court, *supra*, does not accept that characterization of the Act and so finds this contention faulty. Without commenting upon the wisdom of the Act, the Court does not read it to impose restraints upon the plaintiffs' ability to publish their newspaper. Indeed the Act specifically forbids newspapers operating under a joint operating agreement from; ". . . predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." (§ 1803(c))

It may be that Congress could have adopted a less heavy-handed piece of legislation to accomplish the objective of maintaining the solvency of large metropolitan daily newspapers. However this Court does not detect any compulsion for such rectitude in either the First or Fifth Amendment. Congress has legislated under the Commerce Clause and this Court will uphold the ability of Congress to so act even if its decision may have been unwise. This Court does not sit as a superlegislature to re-evaluate the financial and other data upon which Congress made its decision. Finding no constitutional defect in the Act this Court cannot negate the legislative judgment upon a matter within Congress' power to act.

IV. *Act Fails to Carry Out Congressional Purposes*

[7] The plaintiffs contend that the Act permitted the defendants to eliminate one of the former newspapers in the city (News-Call-Bulletin) and thus deprive the San Francisco public of the guarantee of freedom of the press. The Court does not so read the Act. There is nothing contained in the Act which would appear to authorize the elimination of a newspaper as part of a joint operating agreement. Indeed the whole tenor of the Act is the preservation of existing papers. It is a matter of evidence to be determined at trial whether the conduct of the defendants while entering their joint operating agreement bars them from the protection of the Act. There is nothing in the provisions of the Act to lead the Court to believe that it contemplates or permits the elimination of an established editorial voice.

V. *Retroactivity*

[8] The plaintiffs contend that since by its terms the Act was specifically made applicable to pending cases, its application in this case deprives them of accrued causes of action without due process of law. The Court does not believe that to be so. This suit was not even filed until after the Act was passed. Accordingly the only interest the plaintiffs may be said to have had at that time was a prospective lawsuit under a certain rule of law (the antitrust laws). Now by the terms of the Act those antitrust laws no longer apply to certain conduct which formerly might have been actionable. That is not retroactivity. Plaintiffs had nothing other than an expectation that a given rule of law would remain the same; there is no vested right in the continuation of such a rule of law.

In addition, this Court knows of no case, and the plaintiffs have cited none, which holds that Congress is prohibited from changing or repealing legislation. That is all that has been done in this case. Congress has decreed that certain portions of the antitrust laws will no longer apply to certain types of newspapers. To insure uniformity Congress specified that the exemption will apply to all pending cases. This does not violate any constitutional provision of which the Court is aware.

VI. *Pre-emption of Cartwright Act*

The plaintiffs contend that the Act was not intended to and cannot constitutionally be applied to pre-empt the California antitrust statutes. (Cartwright Act, Business and Professions Code §§ 16700–16758).

[9, 10] Generally both the states and Congress have legislated in the area of antitrust and monopoly. This Court would be loath to hold at this late date that the federal government has by a particular action completely pre-empted or "occupied the field". At the same time it is clear from the statement of intent, as well as the regulatory language of the Act, that Congress intended that newspapers be permitted to form joint operating agreements. It appears to the Court that no insoluble difficulty is posed by these contending positions. The most likely reading of the Act is that insofar as joint operating agreements are concerned, they are to be validated and insulated against state as well as federal antitrust proceedings. This would in any event be clearly mandated by the Supremacy Clause (Article VI) of the Constitution, since otherwise state laws forbidding such joint operations would nullify the congressional purpose. At the same time there is no reason either in the regulatory language of the Act or in the declaration of policy (§ 1801) to find that the state antitrust laws cannot be given effect when consistent.

[11] The Act itself has specific regulatory language regarding predatory practices that indicates that it is only a partial exception to the federal antitrust laws. The Court, accordingly interprets the Act to contemplate concurrent state antitrust regulation in those areas and to the extent that they are not exempted from federal antitrust laws. There is nothing contained in either the Act, the Commerce Clause, or the Supremacy Clause that will prevent the application of the Cartwright Act to defendants' conduct that is predatory or otherwise outside the limited exemption for joint operating agreements. Such determinations must of course await the fact finding processes of trial.

For the reasons discussed in section V of this opinion, the Court sees no difficulty with respect to the claim that this exemption from state law is retroactive and hence impermissible.

Conclusion

The Court has discussed each of the principal contentions of the plaintiffs as it understands them to be. It has encountered some difficulty in that the arguments were first advanced in memoranda directed to defendants' motion to dismiss and have only by reference been adapted to the plaintiffs' motion to strike portions of the answer.

[12] The Court concludes that the Newspaper Preservation Act is a constitutional statute that violates neither the First nor Fifth Amendment to the Constitution. The Court further concludes that the Act does not pre-empt but merely modifies in part the operation of state antitrust laws. Finally, the Court concludes that the Act can constitutionally be applied in this action to conduct occurring both before and after passage.

Accordingly, on the basis of the foregoing conclusions,

It Is Ordered that the plaintiffs' motion to strike the 1st and 2nd affirmative defenses asserted in the answer be, and the same is hereby denied.

The **Chairman**. We will have the next witnesses.

Mr. **Bell**. Mr. Chairman, we will now call up four witnesses: Mr. Brindle, Mr. Spain, Mr. Dashefsky, and Mr. Kress. Each one of these gentlemen will speak for 2 or 3 minutes.

The **Chairman**. I believe you have about 3 minutes apiece.

STATEMENT OF RICHARD L. DASHEFSKY, ESQ., LAW FIRM OF GIBSON, DUNN & CRUTCHER, WASHINGTON, D.C., REPRESENTING GLEASON CORP., NATIONAL GYPSUM CO. AND COMPANY X

Mr. **Dashefsky**. Mr. Chairman, members of the committee, my name is Richard Dashefsky. I am an attorney with the law firm of Gibson, Dunn & Crutcher. I am appearing here today on behalf of the National Gypsum Co., the Gleason Corp., and one other company which does not wish its identity known.

These three companies of greatly varying sizes are presently defendants in different antitrust cases. Much already has been said today about the merits of an amendment to S. 995 which would make claim reduction applicable to pending cases.

Each of the companies on whose behalf I am testifying agrees completely with what has been said in support of application of S. 995 to pending cases. These three companies think that application to pending cases is desirable and beneficial and will correct the unfairness now existing under the antitrust laws.

An example of the unfair situation under the present law is vividly shown by the situation faced by the company which I cannot identify. I will call it Company X. There is pending a price fixing antitrust case in which over 10 companies are named as defendants. Company X is also named as a defendant even though it does not sell the product which allegedly was the subject of the price fixing agreement. The client's connection with the other defendants in the lawsuit stems from a relationship with the other defendants not in any way claimed to be unlawful.

There has been one settlement by a company which has approximately a 1-percent share of the market. We understand that all or most of the other defendants have entered into a sharing agreement, but our client has not been able to be a party to that sharing agreement because it does not have any sales.

Our client strongly feels that the defendants who sold the product and allegedly increased the price should be responsible for the damages, if any, in the case. Our client in no way participated in the benefits of the alleged conspiracy. Unless S. 995 is made applicable to pending cases, our client could be placed in jeopardy if the other defendants settle but leave their sales in the case insofar as our client is concerned.

Another example of the present unfairness under the antitrust laws is seen in Gleason Corp.'s situation. There is a series of cases being heard by a judge in New York City involving claims of price fixing in the shopping cart industry. There are four companies including Gleason who are members of the industry and who are the defendants in these cases. These cases have been pending since 1980.

There have not been any settlements by any of the parties. Application of S. 995 to pending cases would mean that each of the companies would be responsible for those damages, if any, resulting from any violations which might be found to have been committed by that particular defendant.

Gleason is a small privately owned company. It would be unfair and indeed devastating for Gleason to be put in a position where it might be responsible for the damages attributable to the other members of the industry, two of which are relatively large publicly traded companies.

Finally the situation in which the National Gypsum Co. finds itself also shows the desirability of applying S. 995 to pending cases. National Gypsum, a manufacturer of cement, is one of 40 defendants in a series of price fixing cases. They have been pending over 5 years. There have been approximately one-half dozen settlements between the plaintiffs and the cement manufacturers-defendants.

Application to pending cases would be desirable because each defendant then would be responsible for the damages resulting from the sales made by that defendant in alleged violation of the law.

Thank you.

STATEMENT OF ALEC W. BRINDLE, PRESIDENT, WARDS COVE PACKING CO., INC., SEATTLE, WASH.

Mr. **Brindle**. Mr. Chairman, Senators, my name is Alec W. Brindle. I am president of Wards Cove Packing Co., Inc., a processor of Alaska salmon. We support the proposed amendment to S. 995.

Wards Cove was recently a defendant in a treble damage civil action tried in Seattle during the fall of 1981. Our case illustrates the difficulties presented to a defendant in a treble damage case where the other parties have been allowed to settle.

As it turned out, the jury's initial ballot was unanimously for defense on liability. We won. However, our experience in dealing with plaintiffs' tactics will never be forgotten. As defendant, we were faced with the following.

We were asked to be responsible for not only our market share and the market share of all alleged conspirators but for an alleged price differential on an industrywide basis.

The jury was not told that its damage award would be trebled and plaintiffs' attorney fees added. The jury was not aware that plaintiffs' appeals to provide modest damages would have resulted in disastrous consequences for us.

Wards Cove is the last family-owned Alaska salmon processing business. Since 1959 we have operated in a joint venture with Bumble Bee Seafoods, a division of Castle & Cooke.

The suit was commenced as a class action by Bristol Bay Native Corp. shareholders who catch and sell fish in Bristol Bay, Alaska. Suit was filed against the eight principal salmon processors who produced about 80 percent of the salmon packed during the case period. About 1,000 fishermen belong to the class.

The plaintiffs sought $20 million in damages after trebling. They alleged a conspiracy by the defendant processors to fix prices paid for raw salmon. The combined production of Wards Cove and Bumble Bee amounted to 26 percent of the market. Early in the litigation, plaintiffs indicated we were the target and that settlement for us would be very dear.

Shortly before trial plaintiffs consummated relatively cheap settlements with other defendants who are our competitors. Plaintiffs demanded $12 million from our company.

It was our perception that plaintiffs had an insubstantial case. However, the possibility that plaintiffs might prevail would have produced disastrous consequences and would have, in fact, destroyed us as a factor in the industry.

Plaintiffs remained confident that the threat of an enormous treble damage judgment would force a large settlement. They refused to lower their settlement demands in spite of repeated attempts at negotiation before and during trial and even while the jury was deliberating.

The risk of an adverse verdict to our company was simply too high to warrant trial if any kind of a settlement had been obtainable. Only the plaintiffs' position of intractability during settlement negotiations allowed a verdict to be rendered. Fortunately, the jury found no violation of the antitrust laws.

We now have to deal with another treble damage case brought by the same plaintiffs and the same plaintiffs' lawyers. This case also presents a similar risk of liability being imposed on our company for an industrywide claim price differential with damages to be trebled if awarded. In this next case, the damages claimed are far more substantial.

Simply stated, the risk of the possibility of an adverse judgment, even with the high probability of a successful outcome, makes trial an undesirable alternative and reasonable settlement impossible. The situation is unfair and inequitable.

Accordingly, we most strongly urge your serious consideration of S. 995, as amended, to eliminate the risk of serious injustice.

Thank you.

The **Chairman**. Thank you.

STATEMENT OF CHARLES H. SPAIN, JR., ESQ., GENERAL COUNSEL, MEDUSA CORP., CLEVELAND, OHIO

Mr. **Spain**. Mr. Chairman, members of the committee, my name is Charles Spain. I am general counsel and secretary of Medusa Corp. of Cleveland, Ohio. I will not read my statement. I will just take two or three pertinent points from it.

Medusa is presently a defendant in the cement antitrust litigation pending in Phoenix, Ariz. In connection with that litigation I have counseled management from time to time at all levels. One of the constant questions that comes to me concerns settlement. The questions I have to answer do not deal with the merits of the case but only the cost of settlement based on their concern that if we go to trial we will be liable for damages assessed against the industry as a whole.

Medusa supports S. 995 primarily because if there is liability, which we do not believe there is, Medusa should only be liable for whatever market share it has and not for industrywide activity.

Also, I conduct antitrust audits with all levels of employees from time to time. It is very difficult explaining to lower level members of the management team that when you are concerned with antitrust the merits of the case in many instances are not the important factor. The cost of the case and the cost of the settlement are the overriding factors in making the decision as to how to proceed.

If you apply S. 995 to pending cases, you will remove a situation where the merits of the case are not considered.

Thank you.

The **CHAIRMAN**. Thank you.

STATEMENT OF DONALD F. KRESS, SENIOR VICE PRESIDENT, GREEN BAY PACKAGING, GREEN BAY, WIS.

Mr. **KRESS**. Mr. Chairman, my name is Donald Kress, senior vice president of Green Bay Packaging. My father, Mr. George Kress, and I have twice before appeared before your committee as a company that was victimized by an antitrust case, a company that was innocent but because we were small and unable to defend ourselves because of the phenomenal liabilities involved in joint and several liability we were forced to settle.

We have submitted written statements, but there is no statement that can describe the kind of anguish and the kind of outrage that took place between our family, our board, and our employees at finding ourselves unable to find justice in the courts because we just could not afford to prove our innocence. Subsequently we were found innocent.

The current law is inequitable. I think there is no question of it. Currently the matter before this committee of claim reduction in pending cases is to us just a question of justice. We can no longer be helped by this legislation, but justice has to start someplace. We think claim reduction will help the companies that are currently involved. At least if somebody is going to get justice out of it, they should.

Thank you.

The **CHAIRMAN**. Thank you very much.

[Prepared statements of Messrs. Dashefsky, Brindle, Spain, and Kress follow:]

STATEMENT OF RICHARD L. DASHEFSKY, ESQUIRE
GIBSON, DUNN & CRUTCHER

Mr. Chairman and Members of the Committee:

My name is Richard Dashefsky and I am a partner of Gibson, Dunn & Crutcher in Washington, D. C. Our Los Angeles office represents a number of clients who are interested in the Antitrust Equal Enforcement Act and favor its application to pending cases.

One such client is National Gypsum Company, a manufacturer of cement and one of some 40 defendants in a series of price fixing cases pending in the State of Arizona. These cases have been pending over five years and the defendants vigorously deny any liability. There only have been approximately one-half dozen settlements in these cases. With one exception each settlement contains a provision which in substance carves out of the lawsuits the sales of the settling defendant. The application of the Antitrust Equal Enforcement Act to these cases would be desirable and beneficial, since each defendant would then be responsible for the damages, if any, resulting from the sales, if any, made by that defendant in alleged violation of the law. National Gypsum urges the Act be made applicable to pending cases.

A second client is Gleason Corporation, a manufacturer of shopping carts. There is a series of cases being heard by a judge in New York City involving claims of price fixing in the shopping cart industry. There are four companies who are members of the industry and who are the defendants in these cases, which have been pending since 1980. There have been no settlements by any of the parties. Gleason urges that the Antitrust Equal Enforcement Act should apply to pending cases. The application of the Act to pending cases would mean that each of the companies would be responsible for those damages, if any, resulting from any violations which might be found to have been committed by that particular defendant. Gleason is a small privately-owned company. It would be unfair and devastating for Gleason to be in a position where it might be responsible for the damages attributable to the other members of the industry, two of which are relatively large publicly-traded companies. The application of the Act to all parties, both plaintiffs and defendants, would be eminently fair.

A third client which supports the Antitrust Equal Enforcement Act is one which I am not authorized to identify. There is pending a price-fixing antitrust case in which over ten companies are named as defendants. Our client is also named as a defendant, even though it does not sell the product which allegedly was the subject of the price fixing agreement. The client's connection with the other defendants in the lawsuit stems from a relationship with the other defendants not in any way claimed to be unlawful. There has been one settlement by a company which has approximately a one percent share of the market.

We understand that all or most of the other companies have entered into a sharing agreement, but our client has not been able to be a party to that agreement because it does not have any sales. This client would like to see the Act applicable to pending cases. It strongly feels that the defendants who sold the product and allegedly increased the price should be responsible for the damages, if any, in the case. Our client in no way participated in the benefits, if any, of the alleged conspiracy. Unless the Act is made applicable to pending cases, our client could be placed in jeopardy if the other defendants settle but leave their sales in the case insofar as our client is concerned.

On behalf of the above clients, I urge that you make the Antitrust Equal Enforcement Act applicable to pending cases.

February 10, 1982

Before the United States Senate
Committee on the Judiciary

Statement of Alec W. Brindle
in Support of Amendment to S.995
to Make It Applicable to Pending Cases

I am the President of Wards Cove Packing Co., Inc., a processor of Alaska salmon. We support the proposed amendment to S.995.

Wards Cove was recently a defendant in Bristol Bay Antitrust Litigation, MDL 249 (A-4), a treble damage civil action tried in Seattle during the fall of 1981. This case illustrates the difficulties presented to a defendant in a treble damage case where the other parties have settled.

As it turned out, the jury's initial ballot was unanimously for the defense on liability. However, our experience in dealing with plaintiffs' ad terrorem tactics will never be forgotten. As defendant in this litigation, we were faced with the following:

1. Wards Cove and our partner, Bumble Bee Seafoods, were asked to be responsible for not only their market share and the market share of all alleged conspirators but for an alleged price differential on an industry-wide basis.

2. The jury was not told that its damage award would be trebled. The jury was not aware that plaintiffs' appeals to provide "modest" damages would have resulted in disastrous consequences for defendants.

3. The only credit against a prospective judgment would have been the total of settlements, to be deducted from the damage award (industry-wide) after trebling.

Wards Cove Packing Company is the last family-owned Alaska salmon processing business and one of the most successful. It is managed and controlled by my father's family (A.W. Brindle). Since 1959, we have operated in a joint venture with Bumble Bee Seafoods, a division of Castle & Cooke, Inc.

The A-4 suit was commenced as a class action by Bristol Bay Native Corporation shareholders, who catch and sell fish in Bristol Bay. Suit was filed against the eight principal salmon processors who produced about 80% of the salmon packing during the case period (1971-74). About 1,000 fishermen belong to the class.

The plaintiffs sought about $20 million in damages after trebling. They alleged a conspiracy by the defendant processors to fix the price paid for raw salmon. After filing suit, the Bristol Bay Native Corporation itself bought one of the defendant companies (Peter Pan Seafoods). To avoid problems with class certification, the plaintiffs settled with Peter Pan for the sum of $50,000.00. The facts of the case indicated that if there had been a conspiracy, Peter Pan would had to have been the chief representative of the conspirators for it negotiated the salmon contract prices with the fishermen's marketing associations in three of the four years in question. The other season contract prices were negotiated by Whitney-Fidalgo Seafoods, Inc. Whitney settled out of this case for $200,000.00.

The combined production of Wards Cove and Bumble Bee amounted to 26% of the market. Very early in the litigation (commenced in 1974), plaintiffs indicated that the target defendants were Wards Cove and Bumble Bee and that settlement with those two companies would be very dear.

Shortly before trial (commencing on August 17, 1981), plaintiffs consummated their settlement with Whitney and picked up relatively cheap settlements with all defendants except the targets. Queen Fisheries settled, paying $300,000.00; Alaska Packers Association paid $1 million, and New England Fish Company had gone into bankruptcy. Plaintiffs demanded $12 million from Wards Cove and Bumble Bee.

It was our perception that plaintiffs had an insubstantial case. They relied principally on circumstantial evidence of price parallelism, opportunity to collude, and the existence of numerous trade association meetings. There was no direct evidence of conspiracy. However, the possibility that plaintiffs might prevail would have produced disastrous consequences and would have, in fact, wiped out the Wards Cove Packing Company as a factor in Alaska industry. Plaintiffs remained confident that the threat of an enormous treble damage judgment would force a large settlement. They refused to lower their settlement demands in spite of repeated attempts at negotiation before and during trial and even while the jury was deliberating.

The risk of an adverse verdict to our company was simply too high to warrant trial if any kind of a settlement had been obtainable. Only the plaintiffs' position of intractability during settlement negotiations allowed a verdict to be rendered. Fortunately, the jury found no violation of the antitrust laws.

We now have the tag-along case to deal with. It has been designated as MDL 249(B-5). It deals with the salmon seasons of 1975-1978. While it is now more manageable, that case also presents a similar risk of liability for an industry-wide claimed price differential with damages to be trebled if awarded.

Simply stated, the risk of the possibility of an adverse judgment, even with the high probability of a successful outcome, makes trial an undesirable alternative and reasonable settlement impossible.

Accordingly, we most strongly urge your serious consideration of S.995 as amended to eliminate the risk of serious injustice.

Alec W. Brindle

AWB:DMF:wp

STATEMENT OF
CHARLES H. SPAIN, JR.

Mr. Chairman, Members of the Committee:

My name is Charles H. Spain, Jr. I am General Counsel of the Medusa Corporation of Cleveland, Ohio. Medusa manufactures construction materials, including portland cements, masonry cements, aggregates and other building products. We have approximately 1200 employees, who are located primarily in Ohio, Pennsylvania, Michigan and Georgia.

I have come to Washington today because I believe very strongly that it is fundamentally fair and necessary that S.995 be amended so that at least claim reduction is applied to pending cases. The current law is fundamentally unfair. The antitrust laws, which were designed to assure competition, are being undermined because of the quirk in the law which permits a single company to be potentially liable for damages based upon the sales of an entire industry.

Those who violate the antitrust laws should be required to pay and compensate those who have been injured. Deterrence is provided by the imposition of the treble damage penalty, as well as criminal sanctions. All too often today, however, a company that pays the least is the most guilty, because the most culpable company frequently is the one who seeks to settle first. Under today's law, there usually is no rhyme or reason to the amounts that defendants are forced to pay in settlement in these large antitrust class actions.

This abuse of our legal system is a rapidly growing spectacle which needs correction now. Cases are being filed daily and are being litigated on a scale thought impossible only a few years ago.

It is wrong, from both a competitive and economic perspective, that a company can be sued for astronomical damages based upon an entire industry's sales. Such a rule gives plaintiffs unfair leverage to force settlements in antitrust cases, unlike virtually every other form of commercial litigation.

The antitrust laws do not achieve their goals when a business manager is informed of this rule. It does not enhance deterrence because the business managers I counsel have no intention of violating the antitrust laws. The extremely stiff penalties and potential for criminal prosecution are known to everyone. What happens, instead, is that when a lawsuit is filed that names dozens of companies, large and small, in a particular industry, the business manager's sense of justice is outraged when he is informed about the law; when he is told that although his sales only amounted to a small fraction of the industry (a fact that he is not terribly proud of in any other context), plaintiffs can recover from him hundreds of millions or even billions of dollars, based upon the sales of the industry giants. This breeds nothing but contempt and disrespect for our system of laws.

The Cement and Concrete Litigation, MDL 296, is an example of the need for this legislation now. Plaintiffs' lawyers filed complaints in Arizona naming virtually every cement company in the country as a defendant. Small and large companies are defendants. There have been some settlements. We are vigorously defending this case, and we fully expect to prove our innocence. In the meantime, we urge the Congress to enact an amended S.995 to provide the fair and consistent means of apportioning damages necessary to prevent whipsaw tactics and needless litigation in our case.

I urge that this Committee take action to apply S.995 in cases now before the courts, so that injustice is not perpetuated in the very cases which have given rise to the need for the legislation. Frankly, I think the bill in its present form is an open invitation to plaintiffs' lawyers to try to put together new lawsuits prior to its date of enactment.

We have had enough of massive lawsuits that benefit none but lawyers and which undermine our economy at a time when we can least afford it.

This should be corrected without delay.

PREPARED STATEMENT OF DONALD F. KRESS, SR.

Mr. Chairman and Members of the Committee:

I have appeared before this Committee twice before with my father, George F. Kress, Chairman of the Board of our company, in the Committee's consideration of amendments to the Antitrust Law. In our previous statements before this Committee, we have related to you how we as a small, family-owned company in the Forest Products Industry have been victimized by the current Antitrust Law, and in particular, by the joint and several liability features thereof. It is our feeling that a number of other small companies, perhaps even smaller than we, might now be subject to the same extortive features which are created by the application of joint and several liability and Antitrust Class Actions. We also feel that a change in the Antitrust Laws as they currently exist are definitely in order, and the position of our company was outlined in a letter dated January 29, 1982, to the Chairman of this Committee with copies of each member of the Committee. We have urged a compromise position with regard to the doctrine of contribution applying in Antitrust cases . . . this position being that the new doctrine of contribution in Antitrust cases apply prospectively to lawsuits commenced after enactment of the Law, but that any claim reduction removing the defendant's market share from further claims against any non-settling defendant be applied to pending cases, unless the Judge in such a pending case would find that for some reason a manifest injustice would result. We respectively urge that the Committee consider this compromise as a possible solution between the parties to the pending amendments to the Antitrust Law.

Green Bay Packaging Inc.
Green Bay, Wisconsin
54305

George Kress
Chairman of the Board

January 29, 1982

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
2226 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Chairman Thurmond:

First of all, I would like to make it quite clear that I testified in favor of legislative amendments to the antitrust laws in an effort to remedy for the future the wrongs that I saw befall our family company. The abuses that we have seen could probably never have been anticipated when the antitrust laws were adopted. Although I did not consider S.995 a perfect solution, it did seem to me to be the best proposal at the time.

Proponents of some amendments to the Bill have introduced the subject of retroactivity which has resulted in some controversy and possible confusion. There are two parts to the Bill and it might help to discuss these separately.

The most substantial change which would be created by the Bill is to apply the law of contribution to price conspiracy antitrust cases. This would provide for contribution or equitable sharing among defendants in place of the "joint and several" liability which created the vulnerability of a smaller defendant to the pressure and intimidation we experienced. Our legal position was vindicated by the jury verdict in the Corrugated Container Case, which found that we had not participated in an alleged price fixing conspiracy. The United States Supreme Court has recently held that the joint and several liability of which we were so concerned does apply in antitrust cases.

S.995 would make a substantive change in the law so that contribution would become applicable among defendants, rather than joint and several liability. As this is a substantial change in the existing law, we would be concerned that it would become controversial and its constitutionality questioned if applied retroactively to pending cases. It is therefore my position that the new doctrine of contribution in antitrust cases should only apply prospectively to lawsuits commenced after enactment into law.

The second subject of the Bill is Claim Reduction, which means to me that if plaintiffs settle with a defendant that the defendant's market share is removed from any further claim against other non-settling defendants. This has been described to me as being a legally "remedial" provision and I see no objection to having Claim Reduction apply to pending cases unless the Judge in such a pending case should find that for some reason a manifest injustice would result.

I would like to reiterate that it is my and my Company's prime concern that the antitrust laws be amended to improve their application to smaller businesses. I would hope that the position I have taken would be an acceptable compromise and accepted in principle by all involved and thereby assist in passage of the new law whereby contribution would be applied prospectively only and claim reduction would be applied both prospectively and to pending cases where appropriate.

Sincerely,

George Kress

cc Members of Senate Judiciary Committee

The **Chairman**. Judge Bell, I believe you still have about 5 minutes.

Mr. **Bell**. We want to reserve that for rebuttal, Mr. Chairman.

The **Chairman**. I believe that completes your witnesses then.

Mr. **Bell**. Yes, it does.

The **Chairman**. We will now bring back the first four witnesses for questions: Judge Bell, Judge Renfrew, Senator Ervin, and Mr. Hahn.

The **Chairman**. Judge Renfrew, in the *Corrugated Container* case Judge Singleton stated that an important element in his approval of the settlements was that the plaintiffs specifically reserved their right to litigate against the remaining defendants for the entire amount of their damages. If this right is removed by congressional action, might that not throw the validity of those settlements into dispute?

Mr. **Renfrew**. I do not believe so, Mr. Chairman. There is not a right to hold this Congress hostage to continue existing law. As I explained in my testimony, the general rule is to the contrary. Throughout the course of the *Corrugated Container* litigation the possibility of claim reduction and the right to contribution was discussed many times.

Indeed, during the course of the arguments as to the appropriateness and the fairness of those settlements, lead counsel urged Judge Singleton to approve the settlements and leave for another day the claim reduction part. Indeed, the fifth circuit so indicated, Mr. Chairman, that they felt it was irrelevant to approving the settlements, which they affirmed just recently as to whether there may be a right to claim reduction in the nonsettling defendant.

The **Chairman**. I have another question, Judge Renfrew, that I would like to propound to you.

On page 25 of your written statement you note that you are firmly persuaded that the courts already have inherent powers to grant claim reduction and carve-out. Therefore, both you and Judge Bell agree that the carve-out provision of the bill is already available to those who would benefit by its application to pending cases.

I have found numerous statutes which grandfather in present existing rights by adding such a simple sentence as, "Nothing in this section shall be interpreted as limiting any valid existing rights available to any person in an action under this act."

Would you favor adding such a sentence to this bill? Does this not protect your position?

Mr. **Renfrew**. I do not think it would protect my position as much, Mr. Chairman, as making it just as absolutely clear as possible that the right to claim reduction and carve-out exists and is to be applied to pending cases. My position is contested by lawyers for whom I have great respect.

I believe the courts have that inherent power, but as yet we do not have any court of appeals decision on that point. I think as long as we are addressing this whole subject it would be very wise for the Congress to deal with it specifically.

The **Chairman**. Senator Ervin, I have a question I would like to propound to you.

Even assuming that the legislation contains a provision to protect existing settlements, is it not likely that settling defendants who thought their involvement was all behind them could find themselves in court again litigating the constitutionality of the legislation if nothing else?

Mr. ERVIN. I do not think that is a valid point for two reasons. In the first place, S. 995 says that no settlements that were in existence at the time of the enactment of the bill will be upset. In the second place, S. 995 expressly says that where a defendant settles in good faith, he cannot be held for contribution to anybody else unless the settlement is not consummated.

I think those two provisions would make it impossible for a settling defendant to be held responsible after he has made a settlement. Furthermore, I do not think there is a bit of danger of that because, with the severability clause that was recommended by Judge Renfrew, it would provide that if the settlements were affected, the claim of reduction would not apply. I think there are three answers to that.

The CHAIRMAN. Judge Bell, do you have any comment on that?

Mr. BELL. I agree with what Senator Ervin said. I would add that, under the amendment we favor, contribution would not be an issue because contribution would not apply in a pending case. It would only be in the future. We are only asking that claim reduction be applied in pending cases. Under the amendment we favor, settlements would be absolutely protected. There is just no reasoned argument that can be made. I am waiting with bated breath to hear some lawyer argue that under this amendment we are sponsoring a settlement could be set aside.

The CHAIRMAN. You favor the so-called Lacovara amendment, I believe.

Mr. BELL. I do. That is the one that has all these protections in it. I think you would get to the same place if you dropped (e), but you would have to litigate. You know, we live in a litigious society and a litigious time. Surely it would have to be litigated. The safest thing to do is spell it out in the amendment that we have all described and the one we all favor.

Mr. ERVIN. That would minimize litigation because you would not litigate the question of whether Congress intended it to apply.

Mr. BELL. Exactly. The only people who would be harmed by doing that would be a few lawyers like me. I would not have cases to argue in court, but I am willing to make that sacrifice.

The CHAIRMAN. Judge Bell, plaintiffs and defendants who have already settled in pending cases did so under a certain set of assumptions, that is that any single defendant could be liable for the full amount. Do you think it is fair to those parties to change the rules in the middle of the game to favor the few holdouts who refused to settle earlier?

Mr. BELL. I do not think you will have to face that question because if they have been treated manifestly unjust, then they would not lose their so-called rights. They could make out a case that it is manifestly unjust to change. That is in the law. It is in the amendment which we favor.

I have been puzzled by this. I look at the people who made these settlements who now are claiming that they are somehow being deprived. None of them need guardians. I have not found a one who needs a guardian. They all know what they are doing. They all have able lawyers.

In fact, the lawyers are the principal beneficiaries on the plaintiffs' side. The lawyers will get more in fees than any plaintiff is ever going to get out of the case. I assume the lawyers knew how to look out for themselves. I have some trouble getting stirred up over these so-called rights that are being lost.

Mr. ERVIN. Mr. Chairman, may I make an observation about that same question?

The CHAIRMAN. Senator Ervin?

Mr. ERVIN. I think it is a misnomer to refer to rules of law which are designed to do justice as changing the rules of the game. I do not think the administration of justice ought to be called a game.

Mr. HAHN. Mr. Chairman, if I may, I would like to comment on that issue of fairness and what is called a change in the rules. The amendment we support protects the defendants in prior settlements. In the case of plaintiffs, unless there have been sweetheart deals made, there is no lack of equity. As a nonlawyer, I also fail to grasp arguments that say there is no fairness in a change.

The CHAIRMAN. Senator Ervin, at the very least, will not litigation about the constitutionality of application of claims reduction to pending cases, even if the settling defendants are not involved, result in delays of distribution of settlement amounts already agreed to, which in turn creates an unreasonable burden on the plaintiffs in the affected cases who have been waiting all this time for their damage recoveries?

Mr. ERVIN. I think that it will not affect any settlements at all for the three reasons I gave awhile ago. I do not think that a plaintiff has a right to sit around and anticipate that the rule of law will never be changed. That is exactly what the courts have said, that nobody has a vested right in a rule of law remaining the same. If they did, Congress would lose its legislative power.

Mr. BELL. Mr. Chairman, I would like to add something to that. I know you have reference to the *Corrugated Container* case. There are some $450 to $500 million deposited in the court. I am not in the case, but I have never understood why they could not have a partial distribution. It is commonplace in class actions to have partial distributions.

If I were in the case, I would see if there could not be a partial distribution instead of it being held up as it is being held up now. It is held up by design, I suppose. I cannot imagine why there could not be some partial distribution. I do not think that ought to be blamed on us.

The CHAIRMAN. Judge Renfrew, I have another question for you. In compiling the list of pending cases, were you able to get any impression as to the general attitude those parties might have toward the application of claim reduction in pending cases?

Mr. RENFREW. I do not have the answer to that question, Mr. Chairman. I did not conduct that telephone survey of those parties, but I will check with those who did and submit an answer in writing to this committee if such an attitude was shown.

Mr. BELL. I can answer that. I know enough about the survey.

The CHAIRMAN. Please comment on it, too, Judge Bell.

Mr. **Bell.** I can tell you what the general attitude is. The great majority of American business favors claim reduction. There is a substantial objection to applying contribution to pending cases. That is about the way the business community stands. The only people left objecting to their approach are, as I say, a few dissidents whom we will hear from today.

The **Chairman.** Senator Hatch?

Senator **Hatch.** Judge Bell, how can you be sure that under the Lacovara amendment, assuming that amendment becomes law, the settlements will be protected?

Mr. **Bell.** The way it is written no settlement is to be affected, and, if so, the claim reduction law is effective. However, it would not be prohibited from being applicable to effect a settlement. It expressly so states.

Senator **Hatch.** What about the interests of the members of the class or the plaintiffs in each case? How will they be protected?

Mr. **Bell.** Under the law they would have to show it would be manifestly unjust not to apply a remedial change in the law.

Senator **Hatch.** Does the manifestly unjust language adequately protect the interests of the members of the class or the plaintiffs?

Mr. **Bell.** I think it does for a remedial statute. That is to be distinguished from creating some kind of a new cause of action. Plaintiffs would be affected by a claim reduction, but they could make out a case, if they could do so, that it would be manifestly unjust to apply it to them on some reasoning that they expected to get all this money from the remaining defendants. I think it would be rather hard for them to do that, but they could try.

Senator **Hatch.** It gives the judge a certain amount of——

Mr. **Bell.** You know, they have to pay something for these sweetheart settlements they made. The same people settle cheaply every time. The plaintiffs' lawyers know that they are making sweetheart settlements. They have their own reasons for that. They want to give them some money to operate on. They have to pay for that. It is not fair to make other people pay for something that they got the gain.

Senator **Hatch.** How does the Lacovara amendment, if enacted, affect the approximately 2,800 to 3,000 other pending actions throughout the country?

Mr. **Bell.** It would apply claim reduction to those pending actions. It would not apply contribution to those pending actions. It would make certain that every case in court is treated the same.

Senator **Hatch.** What you are saying is that contribution would be applied prospectively, but the claim reduction would be applied retrospectively.

Mr. **Bell.** Exactly.

Senator **Hatch.** And that the manifest unjust provision within the Lacovara amendment would prevent any injustice to members of the class or plaintiffs, whichever the case may be.

Mr. **Bell.** That is what we believe. That is what we got up for a compromise. The chairman asked us to try to compromise. That is what we got up for a compromise. It has worked because a lot of companies have changed their position. It is in the nature of the thing that you cannot get unanimity. There is no way, as I reported back to several members of the committee, to get everyone to agree. In our country it would be very hard to get everyone to agree on anything. In fact it is seldom ever done, but we are very close to having unanimity.

Senator **Hatch**. In all honesty, a number of companies settled, perhaps not on the basis of sweetheart deals but merely because they made a calculated effort and calculated decision to settle because they wanted to get out of this litigation for whatever they could.

Mr. **Bell**. Oh, yes. Under the present law you look for a so-called sweetheart deal. You say we are in the business of selling boxes or whatever and not in the business of litigating. If we can get out cheap, we will get out.

However, the plaintiff makes the judgment at that time that for some reason they want to get some money. They are the ones who are given the sweetheart deals. They now argue that they have a right to make sweetheart deals because the law gives a right to get all the damages from one company, and the company is really author of its own misfortune because they will not come in and take one of the fine deals and pay.

That just overlooks the right we have in this country to assert your innocence in court. You ought not to have that right thwarted by any such misapplication and distortion of the law.

Senator **Hatch**. Judge, maybe instead of addressing the issues of contribution being applied prospectively we should address the issue of joint and several liability. What are your thoughts concerning joint and several liability? Of course I would also be happy to have any other member of the panel answer these questions.

Mr. **Bell**. If I had been asked in the last Congress to come up with a remedy for this evil, I would have done it on the basis of changing joint and several liability. To me that seems the logical approach.

However, it is like the story of the lawyer who had been arguing about an hour and said to the judge, "Is your Honor with me?" He said, "I am with you, but if I could get back to the point of beginning I would leave you." This law is in that area. We have to take it as we find it. It would have been better in the beginning some 3 years ago to deal with joint and several liability.

Senator **Hatch**. Thank you, Mr. Chairman.

The **Chairman**. Senator East?

Senator **East**. I would just like to pursue one line here in playing the devil's advocate for the moment on this.

Senator Ervin, of course, discusses the power of Congress to do it. Assuming for purposes of discussion that that is true, I suppose that the most difficult problem here becomes a matter of legal policy. We know that the prospective application of S. 995 is a good idea to clear up a law that was not working as it should.

However, prior to then, being the devil's advocate, the argument would be, would it not, that however imperfect the law was, we knew what the rules were. All parties involved would act in reliance on those rules and have to make their corporate and legal decisions accordingly.

In some cases there may have been this sweetheart problem you raised. In others, corporate counsel may simply have advised that this is Russian roulette under present law. Corporate counsel would say the prudent thing to do is to get out as quickly as one can. Until this law is changed that is the best legal advice corporate counsel could give.

Therefore, the corporation would simply settle and get out. Those further down the line, for whatever reasons, maybe felt they were very just in holding out. They had a very small part of the market. They had not, they felt, engaged in any illegal activity and they were going to fight it as a matter of principle, perhaps. I do not know. The motivation runs from one end to another. It is simply impossible to unscramble.

However, it occurs to me that corporate counsel in those cases might simply say, "Look, this law is very vague, troublesome, and it is Russian roulette. I would recommend that we work to get it changed in the Congress, but until we do that we better get out as quickly as we can, just like the rest of the folks are doing."

In other words, everybody knew what it was, at least as much as you can ever know in the imperfect world of the law which is always somewhat vague and subject to misinterpretation, misunderstanding, and confusion, but that is why we have the legal profession. That is why we have to make policy judgments.

Not to get too long winded about it, what I am driving at is how does one respond to corporate counsel who might have advised their clients accordingly. Would they not have been giving them good, sound legal advice at that time based on the known law and based on the proposition that normally we would expect that if the law is changed it would be prospective in application?

Mr. **Bell**. You would be giving sound advice. I give that advice. I say to a client that under this law you can be blackmailed and money can be extorted from you. Then the client gets very upset, particularly if it is a family business. They say, "How could the law be so unjust?"

I say: "That is just the way the law is and you may have to pay something. Otherwise you may lose your business, your whole business. These pragmatists, these corporate lawyers you are speaking of who are just used to this sort of litigation are going to tell their clients to pay. They are going to get out fast. They are going to get out cheap. You are going to get stuck. You are going to be holding the bag and are going to have to pay."

You cannot believe how hard it is to explain to an American citizen, an individual whose family owns the business, that they have to live under an unjust law. It is very difficult to explain. I have one client now who is still upset about something on which he paid money back in 1976. Every time I see him he asks,"Is the law still unjust?" I answer, "It still is. We are trying to get it changed."

Mr. **Ervin**. I think one answer to the question of the devil's advocate is the reason we have the Congress of the United States is so the Congress of the United States can change unjust laws. Administration of justice ought not to be like playing Russian roulette. Nobody has a vested right in an unjust law. Nobody has a vested right to perpetrate an injustice. Where it appears in particular that the ability to perpetrate the injustice arises out of a law which Congress passed with the best of intentions, it is all the more incumbent upon Congress to change the unjust law.

Senator **East**. You make a good point, Senator, although in showing the problem of making policy judgments retroactive and in hindsight one might argue just abstractly at the time that the virtue of joint and several liability would be to really discourage antitrust violations. That makes you sit up and take notice that you better not do it. That may have been the purpose of the law at that time.

What you are saying is it worked out in practice. It does not seem to be as good on the merit as the policy result and so we are going to change it now. I guess I am a little resistent to the notion that one could argue categorically that the original policy of joint and several liability was inherently unjust and unfair, that there could not have been any reasonable rationale for it.

Mr. **Bell**. Oh, no. It was a sound thing at the time. It was so you could collect the whole damages.

Senator **Hatch**. Would the Senator yield on that?

The criminal penalties alone are a significant deterrent, are they not?

Mr. **Bell**. Oh, yes.

Senator **Hatch**. I do not know of any executive who wants to face the criminal penalties under the antitrust laws.

Mr. **Bell**. There is every kind of deterrent in the antitrust laws. If we are in any area of the law, we are overlawed in antitrust.

Mr. **Ervin**. I just started to make the same observation. The deterrents remain. An individual who violates the antitrust law by price fixing can be sent to prison for 3 years as a felon. He can be fined $100,000. If it is a corporate offender, he can be fined $1 million. Those deterrents are still here.

This law making claim reductions apply to existing cases would not penalize any plaintiff unless that plaintiff made a sweetheart contract and tried to let one culprit escape with a small penalty in the hope that he could hold somebody else responsible for that corporation's action.

Mr. **Hahn**. Mr. Chairman, could I respond to the question?

The **Chairman**. All right, go ahead.

Mr. **Hahn**. First on the question of deterrence, speaking from the business side let me simply say that the combination of criminal exposure and treble damages for your market share for any damage alleged to have been caused certainly represents adequate deterrence.

In fact, the problem is not that there are meetings in smoke. filled rooms or that there are agreements. The problems are that the trial results of antitrust cases are so unpredictable because of inferred actions, parallel pricing responsive to the market, that it is impossible for a corporate executive to really know what an outcome will be. The deterrents are there for antitrust violations that are recognizable and understood.

On the question of fairness, there seems to be no debate that the way the present law is working is unfair and unjust because you do get the last man in the canoe. Your corporate counsel and your outside counsel will say the risks are so high, even though there was no wrongdoing, that you are going to submit to blackmail if you exercise your constitutional right to try to prove you are innocent. Therefore, settle by the sweetheart deal. It is no longer the sweetheart deal. It has gotten expensive when it has gotten to you, but still settle.

There is no debate about the fairness. There is little division that I can perceive in the business community about the need for S. 995. The only question is the question of carve-out of market shares on a prospective or pending basis.

I think the answer to that question is that it is agreed it is fair to have the carve-out provision. Certainly this distinguished committee is expressing its commendable interest in correcting this injustice. These antitrust cases go on for years and years and years. If it is fair and if you are going to correct it and have that inequity corrected any time soon, it should apply to pending cases.

As far as that being unfair to anybody else, I think that point has been covered in that prior settlements are protected, and, if there is a manifest injustice, the section is not applicable.

Mr. **Ervin**. If I may add just one thing, I have noticed for a long time in the study of history and in observing things that nobody who has the power to practice tyranny on another ever voluntarily wants that power taken away. That is exactly the situation of the plaintiffs in these cases who oppose this bill and applying it to pending actions.

They now have the power under existing law enacted by Congress to practice tyranny on the defendants. Quite naturally they do not want that power taken away from them. They think it is iniquitous to do so.

The **Chairman**. Senator Grassley?

Senator **Grassley**. Thank you, Mr. Chairman.

I think Mr. Renfrew is the one I should address this question to. I think he is the one who commented on it, but I would welcome comments from anybody else as well.

Mr. Renfrew, you made a point that the first wave of settlements had been approved in the *Corrugated* case. Therefore, under your theory, they may be protected.

My question is in regard to how this amendment would affect the remaining settlements for defendants whose settlements have not received final approval.

Mr. **Renfrew**. It would protect all settlements that have been signed, Senator, whether approved or no. It would protect those that had been agreed to so that the parties could rely upon their bargain.

Senator **Grassley**. Thank you, Mr. Chairman.

The **Chairman**. You mean if the parties have agreed it would protect it whether the judge approves them or not?

Mr. **Renfrew**. Yes, sir. That is under the amendment.

Senator **Grassley**. Yes. That is what I was talking about.

Mr. **Bell**. It is under the amendment we have been advocating.

The **Chairman**. Senator Heflin?

Senator **Heflin**. I can observe that while we have unemployment in this country, there is not any unemployment among Washington lawyers.

Senator Ervin, I might have misunderstood, but in your definition of what you feel is manifestly unjust, can you tell us what you think the definition of that is?

Mr. **Ervin**. It is what is unconstitutional. That is exactly what Chief Justice Marshall says in the first case on the subject of applying a new law to a case which had originated prior to that time. He said that ordinarily the courts merely decided whether a case had been decided properly by the court that was being reviewed. However, he said that where there was change in the law during pendancy of the case the change had to be applied to the law as it existed at the time of the bringing of the case, that is retroactively, unless one of two things occurred.

The first was that the statutory language or the legislative history of the new law showed that Congress did not intend it to apply to pending cases, or unless the act of Congress was unconstitutional. That was before they invented the very beautiful but indefinite term that it must result in a manifest injustice.

Judge Learned Hand, in one of his opinions, makes it very clear that that is what it means. In other words, it will apply unless Congress intends it not to apply, or unless the application would offend a constitutional principle.

Senator **Heflin**. Do you now exclude the unconscionability or unconscionable settlements from the words "manifest unjust"?

Mr. **Ervin**. I think the settlements are excluded by the phraseology of the statute and not by that. In other words, as I construe the decisions going back to 1801, in *United States* v. *Schooner Peggy* and many subsequent cases, including the recent cases of *Bradley* v. *Richmond School Board* and *Cort* v. *Ash*, the manifest injustice was only where the act of Congress is unconstitutional in its application to the particular case.

Senator **Heflin**. Do you all agree with that?

Mr. **Bell**. I would have a little broader view of it. I would say a manifestly unjust situation might include a situation where to hold otherwise would be against public policy, unconscionable conduct, in pari delicto situations. I would say it is a little bit broader. Like so many things in law it is an evolving concept. It is only limited by the imagination of the lawyers and the forum.

Mr. **Renfrew**. Senator Heflin, I think it is a broad test. In *Bradley* v. *Richmond School Board*, Mr. Justice Blackmun, speaking for the Court, set a three-prong test to determine whether something was manifestly injust. First, the nature and identity of the parties affected, then second, the nature of the right, and then third, the impact upon that right of the legislation itself.

In that case the question arose whether attorneys' fees could be awarded in a school desegregation case which had commenced before the law clearly provided for attorneys' fees to be paid in the 1972 school education act to attorneys who prosecuted such a case. The Court there held that it would be applicable to a case that was pending at that time with the change in law. The change of law would be applicable in that case because it would not be manifestly unjust to do so.

Mr. **Ervin**. I would like to make this observation. If the broader interpretation that manifest injustice could be something additional to a constitutional violation, that would be to the advantage of the plaintiffs rather than to the advantage of the defendants.

Mr. **Bell**. I think that is certainly true.

Senator **Heflin**. Of course one of the things not in this case but the other case is it seems to be a problem of the business community getting together. Some of us are just about to knock heads to get the business community to get together. This thing has gone on now for months and months and months. In my judgment they ought to get together. I think that is the feeling of a lot of people.

You have cases in which there is a situation in which the jury sets forth in its decision that there was a right to proceed against the other defendants as being a substantial right and one of the rights that he affirmed in the settlement.

Looking at that particular instance, is that manifestly unjust? That is a crucial point in some people's thinking in regards to this. For example, in Alabama I have five on one side and five on the other side and I want to keep them all happy.

Mr. **Bell**. I have a good solution for that case you are talking about. That is for the plaintiffs to put back the $500 million, give it back and try the case. Judge Singleton can order that. He can say,

> It is manifestly unjust to apply this law, and since the Congress passed the law I am going to set aside the settlements and give back everybody's money.

There will be about 22 of them that will get out altogether and will not pay anything then, but I think that would be a good direction for that case. That would be justice done in America.

The **Chairman**. Has that case been tried yet?

Mr. **Bell**. It is back on damages. The damages part of it has not been settled on the Mead part. I think Mead is the only one left in it. The others have settled. However, I have not heard of any plaintiffs moving to get out of the case or to give the money back.

Mr. **Ervin**. I might state that in the *Bradley* case the court said that the courts had not defined the exact meaning of manifest injustice. However, the way I analyze these cases when you take the application of them, they held, for example, during the early days of the Roosevelt administration where they passed a law nullifying some of the provisions of the war risk insurance policies, that the Congress could not do that because that was a contract on the part of the United States and it would be contrary to due process to nullify a valid contract.

They said the same thing where they tried to apply the gold payment statute to bonds issued by the United States as contradistinguished to bonds issued by States or by individuals.

The **Chairman**. Are there any other questions?

[No response.]

The **Chairman**. If not, thank you gentlemen very much.

Mr. **Bell**. Thank you, Mr. Chairman.

The **Chairman**. Now we will take up the other side. I believe Mr. Kelly is the first witness we have. Mr. Kelly, you may proceed. You have 5 minutes.

STATEMENT OF RICHARD S. KELLY, LAW FIRM OF KECK, MAHIN & CATE, CHICAGO, ILL.

Mr. **Kelly**. Thank you, Mr. Chairman.

My name is Richard Kelly. I am an attorney with Keck, Mahin & Cate in Chicago, Ill. Formerly, I was senior vice president and general counsel of Container Corp. I am appearing here on behalf of Mobil Corp.

Our position is that S. 995 should not apply to pending cases, but it should not apply to future cases either because we are opposed to contribution. If the bill related to claim reduction, we would essentially take no position on its application, as you will see from the legislative alternative I have proposed.

In my judgment, this controversy is in danger of obscuring the paramount issue, the scope of joint and several damage antitrust liability today. It is an urgent issue that needs addressing now. I do not think it is too late to do it.

I ask that my written statement be put in the record. I have a few remarks to make in connection with it.

Joint and several liability came into the antitrust law at the turn of the century. Since that time there have been revolutionary changes in the antitrust damage proceedings. We can obtain jurisdiction over defendants in virtually all cases. Fraudulent concealment and suspension of the limitations period results in long statutes of limitation. The conspiracy doctrine has been expanded. Damage calculation has become the preserve of economists with nuances in their theories being translated into hundreds of millions of dollars of damages, and the mammoth class action has become an understandable but unfortunately commonplace reaction to court congestion.

At the time of the city of Atlanta decision on joint and several liability the GNP was $23 billion. Now it is $2.5 trillion. The shipping container sales were $10 million in 1923. They have risen to over $9 billion in 1980. The sales of the 37 defendants in the shipping container class action proceedings for the complaint period of 1960 to 1978 I would estimate to be $45 to $50 billion. One percent of that figure trebled is $1.5 billion.

The sales of these companies for this five year period is $20 billion. One percent of that trebled is almost $600 million. Assuming normal pretax margins, 75 percent of these companies made less than $50 million, and a third made less than $25 million during that 5-year period. However, that is to be expected when one considers the market shares.

I have put in the record a set of the market shares that the court found. You will note that very few of them exceed 4 percent. Consider the minute shares of the bulk of the 48 businesses claimed by the Department of Justice to have been coconspirators.

With all that background, 36 out of the 37 companies settled. Container Corp. settled for $34 million, which is $4 million a point.

You have heard about the jury verdict against Mead, the cost of the trial to Mead, and the fact that the verdict is said to be the forerunner of possibly a $1 billion judgment based on an economist's view of the divergence between certain price indices and based on the sales of half of those 37 defendants. You have heard all about the ratcheting technique in settlements.

With all of this in mind, I submit that treble damage relief which started out as a sound balanced remedy has become unbalanced and unfair to the vast majority of American businesses. I am very happy that your committee is looking at it, and I think S. 995 is a thoughtful and understandable reaction to this situation.

I have observed little opposition to the claim reduction features. There has been opposition to the contribution features because of the complexities and difficulties it introduces.

As one who has been through the wars, so to speak, what do I advocate? The heart of the matter is joint and several liability. That liability not only in price fixing but in other actions ought to be limited to market shares, at least in treble damages if not for single damages.

In this day of market structure it is most unlikely that a plaintiff will be thwarted in its recovery of damages by inability to obtain jurisdiction or inability to recover because of insolvency. The larger the market share the larger the defendant and the more remote those possibilities. If deterrence is a concern, there are plenty of remedies to take care of it.

Focusing on claim reduction and contribution, the antitrust defendant's chief concern is its potential liability as to the sales of all defendants. If the settling codefendants' sales are removed, the defendant can proceed with a much fairer burden.

The addition of a right to contribution gives the defendant nothing more except in the unusual situation where defendants with significant market shares are neither sued nor the subject of settlement. To the contrary, contribution, with its potential cross-claims and third-party claims, will add to the complexity and divisiveness of litigation which is already too costly and divisive.

Therefore I favor claim reduction because it substantially achieves the desired result without the bad effects of contribution, and I oppose contribution. I have brought with me today and submit to the committee a proposed claim reduction bill as an amendment, about which I would like to make just a remark or two.

Section 1 of the bill provides for claim reduction as is now done in connection with the present bill, wherein one takes sales out where there is a settlement. It expands this to say, if there is a settlement outside of or prior to the pending litigation but related to it, those settlements are picked up.

Plaintiffs should have no problem basically with claim reduction because it takes two to settle. They have control of the situation. It does require additional work on the part of the court to determine market shares, but courts do that every day now.

I do not see claim reduction impeding settlements. They have not done so where sharing agreements are involved.

The **Chairman**. I believe your time is up. You can just put the rest in the record.

Mr. **Kelly**. OK.

The **Chairman**. Any questions for Mr. Kelly at this time?

Senator **Hatch**. I have some, Mr. Chairman.

The **Chairman**. Senator Hatch?

Senator **Hatch**. Mr. Kelly, I am interested in your belief that we ought to examine joint and several antitrust liability in general. Why?

Mr. **Kelly**. Because what started out as a balanced remedy has become mammoth and disproportionate liability which arises out of today's market and market shares and could not have been envisioned in 1890 or 1903. What we have now are massive transfers of funds from one group of enterprise to another with the cost through the legal system of 10 or 20 percent.

In a recent class action case, a $50 million fund, that cost might be 50 percent because the plaintiffs' counsel have asked for 40 percent of the fund. I do not see that as benefiting society in any way. I do not see prices being reduced as a result of it from the recipient companies. Those are determined by supply and demand in any event.

I see the impact particularly on the smaller business which is not staffed to cope with a situation like this. It is very catastrophic and limiting in the markets it wants to get in.

Senator **Hatch**. What would you do with joint and several damage liability?

Mr. **Kelly**. I would limit it to market shares. Antitrust violators presumably violate because they want to enhance the value of their market share, whether that is in a price fixing situation or any other situation. If the antitrust violator is a broker, the court can determine how that ought to apply. If the antitrust violator is a trade association with no market share, Senator, you mentioned some of the remedies that are already here. Those remedies are available.

Senator **Hatch**. Are your remarks limited to horizontal price fixing actions?

Mr. **Kelly**. No; antitrust violations wherever a court can comparably use a market share criterion.

Senator **Hatch**. What you are suggesting would be in the eyes of some a very drastic change. Suppose Congress wanted to take some action but not go that far?

Mr. **Kelly**. Congress could limit the treble damage remedy that it created to market shares and limit a continuation of present joint and several liability recovery to single damages.

Senator **Hatch**. What would that accomplish?

Mr. **Kelly**. That might satisfy the concerns that some people might have in that there the plaintiff will be able to recover damages totally and there would be adequate deterrence. I do not think it is necessary, but I think it certainly would satisfy those concerns.

Senator **Hatch**. The central issue as I see it at this particular committee meeting is the desirability of proposed section 42(e) which provides that the contribution legislation apply only to actions commenced after the date of enactment. Do you favor that section?

Mr. **Kelly**. No; because I do not favor contribution, Senator.

Senator **Hatch**. If the bill provided only for claim reduction, would you favor that section then?

Mr. **Kelly**. I would be neutral on that issue. It would not trouble me either way. Nor would it trouble me if the courts determined it. It is not the most important issue. The key issue is the basic liability issue. What I am concerned about is that we lose sight of that. The timing right now is good because this committee is focused on it and Congress is focused on it. I am very concerned that we use this to study that issue very carefully.

Senator **Hatch**. Thank you.

Mr. Chairman, I hate to leave these hearings. They are extremely interesting to me as one of the authors of the contribution bill which you have very definitely taken some swings at, Mr. Kelly. I have to admit your argument is intriguing, but I do not quite agree with you. It may lend to the general debate that might help resolve this matter.

I have to go up and present our budget to the Rules Committee. I would like to come back and hopefully I can ask questions of the next group as well.

The **CHAIRMAN**. We will be glad to have you come back, Senator. You are a valuable member of this committee.

Senator East, do you have any questions?

Senator **EAST**. No, thank you.

The **CHAIRMAN**. Senator Grassley?

Senator **GRASSLEY**. I do not have any questions.

The **CHAIRMAN**. Senator Heflin?

Senator **HEFLIN**. I have none.

The **CHAIRMAN**. Thank you very much.

[The prepared statement of Richard S. Kelly follows:]

STATEMENT BY RICHARD S. KELLY TO THE COMMITTEE ON THE JUDICIARY U.S. SENATE S. 995

My name is Richard S. Kelly. I am an attorney with Keck, Mahin & Cate, Chicago, Illinois, and formerly was Senior Vice President and General Counsel of Container Corporation of America. I am here to express my views on S. 995 and to propose as a legislative alternative, a bill which would provide for claim reduction only and not contribution. Container Corporation is aware of and has authorized my appearance before this Committee, and Mobil Corporation, the parent of Container Corporation, endorses the views expressed herein.

STATEMENT CONCERNING PROPOSED CLAIM REDUCTION LEGISLATION

Since S. 995 is about joint and several antitrust liability it is useful to review very briefly some of the legal and economic developments since that liability was applied to the Sherman Act in 1903 by a U.S. Court of Appeals. That court had this to say on the subject:

> We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued. (City of Atlanta vs. Chattanooga Foundry & Pipeworks, et al., 127 Fed. 23 (6th Cir., 1903))

Thus joint and several liability under the antitrust laws came into being, derived from joint and several liability in the tort field.

Since 1903, there have been revolutionary developments in antitrust damage proceedings. Procedures now permit the trial court to obtain jurisdiction over virtually all defendants in all cases. A specific four-year statute of limitations for the treble damage remedy has been established, but widespread application of the doctrine of fraudulent concealment has expanded that limitations period very substantially in numerous cases. In addition, by statute, the limitations period is suspended during the pendency of various governmental proceedings. The conspiracy doctrine has expanded to reflect the complexities of business. Damage calculation has become the esotoric preserve of consulting economists with nuances in their theories being translated into millions and hundreds of millions of dollars of damages. The mammoth class action has become an understandable but unfortunately commonplace reaction to court congestion.

At the time of the City of Atlanta decision, the U.S. gross national product was almost $23 billion. Last year, the gross national product was over $2.5 trillion. The annual sales of the shipping container industry, with which I have familiarity, have risen from less than $10 million in 1923 to over $9 billion in 1980. This was part of the growth of paperboard packaging from $27 million in 1900 to $14 billion in 1978.

The sales of the 37 defendants in the shipping container class action antitrust proceedings you have heard so much about, for the complaint period of 1960 to 1978, I estimate to be $45 - $50 billion. A mere 1% of this figure trebled is $1.5 billion.

The sales of these companies for the 5 year (1972-6) period used by the plaintiffs in settlement discussions was almost $20 billion. A mere 1% of this figure trebled is almost $600 million. Assuming normal pre-tax margins, 75% of these companies made less than $50 million, and 1/3 of them made less than $25 million from these operations for the period. This is to be expected when one considers the market shares of many of these defendants as found by the trial court.

"Settling Defendants' Percentage Share of
All Corrugated Products Shipped 1970-1977

Settling Defendant Company	1970	1971	1972	1973	1974	1975	1976	1977
Boise Cascase	1.81	1.78	1.86	1.95	2.03	2.13	2.20	2.17
Chesapeake	.93	.91	.92	.97	.92	.88	.88	.87
Container	6.15	5.80	6.16	6.01	6.19	6.30	6.12	6.07
Continental	2.79	3.17	3.19	3.12	2.93	3.10	2.97	2.87
Diamond	.38	.37	.40	.40	.39	.38	.38	.37
Dura-Containers	--	.28	.30	.29	.26	.22	.25	.25
Green Bay	1.18	1.17	1.32	1.23	1.21	1.23	1.18	1.20
Hoerner-Waldorf (Champion)	3.89	3.70	3.68	3.96	3.96	3.83	3.86	3.86
Inland	5.05	4.73	5.00	4.66	5.51	5.54	5.52	5.56
International	5.30	5.57	5.90	6.06	6.09	5.73	6.02	5.93
Longview Fibre	1.66	1.58	1.67	1.81	1.87	2.01	1.96	1.94
MacMillan Bl.	1.80	1.73	1.67	1.74	1.60	1.62	1.58	1.64
Menasha	.99	.93	1.01	1.18	1.26	1.29	1.28	1.33
Olinkraft	1.27	1.03	1.08	.89	.87	.81	.76	.78
Owens-Illinois	3.75	3.86	3.82	4.13	4.06	3.81	3.80	3.80
St. Joe	2.28	2.28	2.09	1.96	1.81	1.80	1.82	1.75
St. Regis	3.22	3.21	3.07	2.89	2.85	2.69	2.78	2.48
Stone	1.65	1.76	1.98	2.10	2.25	2.26	2.41	2.35
Union Camp	2.71	2.78	2.81	2.88	2.91	2.72	2.80	2.80
Weyerhaeuser	5.60	5.49	5.33	5.65	5.71	5.72	5.81	5.85
Willamette (Corco and Western Kraft)	2.71	2.82	2.86	2.87	2.85	3.20	3.29	3.29

Source: Fibre Box Association National
Quarterly Shipment Summaries 1971-1978"

(Additional Findings of Fact and Conclusions of Law Concerning Certain Class Action Settlements, page 7)
Note how few market shares exceed even 4%. Consider the minute market shares of the bulk of the 48 businesses claimed by the Department of Justice to have been co-conspirators.

Understandably, 36 of the 37 companies settled and only one, Mead Corporation, went to trial and jury verdict. The costs of Mead's trial and pre-trial preparation must be in the millions of dollars. The jury verdict against Mead has been said to be the forerunner of a $1 billion plus judgment based on an economist's view of the divergence between certain price indices and based on the sales of half of the 37 defendants.

Having in mind all of these actual and anticipated figures, the plaintiff antitrust bar (the plaintiffs themselves really don't play a role in this kind of bargaining) used a "ratcheting" technique in settlements. Each defendant was asked to pay a higher amount than the previous defendant in its category which had settled, because the non-settling defendant then had fewer co-defendants to share the total liability. Thus, settlements which started at $400,000 per percentage point of market share rose to $1 million per point, then to $2, 2.5, 3.5, 4, 4.5, 5, 6, and, at length, to $6.5 million per point, with some gradations in between.

Treble damage relief, which started as a sound, balanced remedy, has thus become unbalanced and, I submit, unfair to the vast majority of American businesses which find themselves on the defending end of these actions.

So I am pleased that your committee is looking at this area. S.995 is a very thoughtful and understandable reaction to this situation. As you know, it contains a claim reduction feature, i.e., it provides that a settling defendant in a price fixing case, so to speak, "takes its sales out of the case," so that its sales are no longer a basis for damages. The bill then through its contribution feature requires the remaining defendants to share the remaining liability in accordance with their sales by giving each defendant a right to proceed in contribution against the others for damages which are attributable to the others' sales or purchases. I have observed little, if any, opposition from the business community to the claim reduction feature. There has been opposition to the contribution feature because of the complexity and difficulties it introduces in already complex litigation. In addition, as you know, there has been considerable division of opinion over the application of the legislation to pending cases.

As one who has been through these wars, what position do I advocate? The heart of the matter is joint and several liability. This liability should, not only in price fixing actions but also in other antitrust actions where the principle can be applied comparably, relate to the relative magnitude in the affected market of the defendant's sales or purchases of the goods or services involved in the violation, at least for treble damages, if not for single damages. In this day of market structure it is most unlikely that a plaintiff will be thwarted in its recovery of damages by the inability to obtain jurisdiction over, or by the insolvency of a defendant. Typically, the larger the market share, the larger the defendant and the more remote the possibility that the plaintiff will not be able to satisfy a judgment against that defendant. If deterrence is a concern, the cost and other consequences of the array of governmental and private civil and criminal proceedings provide, I submit, ample bases for deterrence.

However, this Committee has focused on claim reduction and contribution, so I will limit my remarks to those areas. The antitrust defendant's chief concern is its potential liability at trial as to the sales of all defendants, often a staggering prospect. If settling co-defendants' sales are removed from the case, the defendant can proceed to trial bearing a much fairer burden. The addition of a right to contribution gives to defendant nothing more, except in the unusual situation where defendants with significant market shares are neither sued nor the subject of settlement. To the contrary, contribution, with its potential cross-claims and third-party claims, will add to the complexity and divisiveness of litigation which is already too costly and divisive. Therefore I favor claim reduction because it substantially achieves the desired result without the bad effects of contribution, and I oppose contribution. I have brought with me today and submit to the Committee a proposed claim reduction bill which I would now like to discuss.

Section 1 of the bill provides that a settlement in a treble damage action shall be deemed to take out of the case the settling defendant's sales or purchases of the goods or services and therefore that the treble damages attributable to such sales or purchases will not be imposed. I am assuming that this measure will result in a larger reduction of liability than the amount of consideration paid for the release or covenant, or the amount set forth in the release or covenant. Since plaintiffs might settle with a potential defendant prior to or outside of the pending litigation, this section is drafted to include those settlements also. Antitrust plaintiffs should have no problem with this section. Since it takes two to settle they have complete control on the extent to which this section becomes applicable. While it does require some additional work on the part of the court to determine market shares, that type of work is commonplace in antitrust litigation now. I don't see claim reduction impeding settlements. They are not impeded in those instances where sharing agreements have been achieved.

Section (b) of the proposal makes claim reduction applicable to other antitrust damage actions where such application would be comparable to its application to a price fixing conspiracy. This section (b) makes the market the test. If a business has a significant market share it is logical to assume that the actions of that business are designed to implement that market share. Section (b) recognizes that there may be circumstances where claim reduction is inappropriate because its relationship to market share is inappropriate. Courts should be able to handle this problem without difficulty.

Section C permits the court to determine claim reduction itself and not submit it to a jury. Since antitrust treble damage actions are the creature of a statute, this should impose no constitutional problem. The last section has severability language.

There is no section in the proposal on the application of this amendment to pending cases because I have taken no position on that issue. As I understand the law, legislation such as this, if considered procedural and remedial, as it seems to be, would apply to pending actions, unless to do so would be manifestly unjust. I am quite content to let the courts decide each such application. My primary concern is that balance be reintroduced into the treble damage remedy.

Thank you.

DRAFT ANTITRUST CLAIM REDUCTION AMENDMENT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

SEC. 4I. (a) The claim of a person giving a release or a covenant not to sue or not to enforce a judgment which is received in settlement by one of two or more persons charged with liability in, at the time of the pendency of, or within 1 year prior to, an action for damages under Sections 4, 4A or 4C of this Act because of an agreement to fix, stabilize or maintain prices or terms of sale, shall be reduced as against the other person(s) charged with such liability by the greatest of: (i) any amount stipulated by the release or covenant, (ii) the amount of consideration paid for it, or (iii) treble the actual damages attributable to the settling person's sales or purchases of such goods and services (except that in an action under 4A, the actual damages shall not be trebled).

(b) This section shall be applicable to other actions under sections 4, 4A or 4C to the extent that such application is comparable to its application to an action for damages because of an agreement to fix. stabilize or maintain prices or terms of sale because, among other reasons, it is possible to reasonably determine the relative magnitude in the affected market of each defendant's sales or purchases of goods or services involved in the violation.

(c) Unless inconsistent with the just and expeditious conduct of litigation, claim reduction rights shall be determined by the court sitting without a jury.

(d) Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections.

The CHAIRMAN. Now we will bring around the next panel. Senator Tydings is here, a former member of this body. Senator, we are glad to have you with us. Mr. Susman and Mr. Kohn will join him. They are famous attorneys in some of the cases that have been tried. Please come forward, gentlemen.

Senator Tydings, please proceed.

STATEMENT OF JOSEPH D. TYDINGS, FORMER U.S. SENATOR, LAW FIRM OF FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & CASEY, WASHINGTON, D.C.

Mr. TYDINGS. Thank you, Mr. Chairman and members of the Senate Judiciary Committee.

My name is Joe Tydings. I am a member of the law firm of Finley, Kumble, Wagner, Heine, Underberg & Casey.

I have a substantial interest in the legislation you are considering this morning. For 9 years I have been co-lead counsel for the plaintiffs in the *Plywood* case with Mr. Harold Kohn. Mr. Kohn was chief trial counsel. I was co-trial counsel at the trial table in New Orleans against Georgia-Pacific, Weyerhaeuser and Willamette in 1978. The jury returned a verdict against them, which is one of the reasons they are here before this committee today seeking relief from you after they lost before the juries and the courts of their own district and circuit.

I have also been active in the *Corrugated* case, although not a member of the trial team, with Mr. Susman. I have been an active trial advocate for 30 years come this November in the courts of my State and in a number of other States, with 6 years out to serve in this body.

I was U.S. attorney for my State of Maryland for 3 years. I was privileged to serve as chairman of your Subcommittee on Improvements in Judicial Machinery for 5 years with your distinguished chairman, Senator Thurmond, Senator Ervin, and late Senators Hart and McClellan, to whom I am grateful because they waived their seniority to permit me to be chairman of that subcommittee for 5 years.

Among the legislation which Senator Ervin, Senator Thurmond, and I drafted, authored, introduced, and got passed through Congress was the Federal Magistrates Act, the Federal Jury Selection System, the Federal Multi-District Litigation System, the Federal Judicial Center, and other pieces of legislation to strengthen our judicial system.

I am appearing today to strongly urge you not to adopt the proposed contribution legislation retroactively. My testimony will be solely concerned with retroactivity and the precedent you will be setting if you adopt the request of Georgia-Pacific, Mead, and Weyerhaeuser appearing before you today.

The original proposal for contribution before this committee is a prospective bill. That is certainly within the powers, the jurisdiction, the rights, and the responsibilities of the Congress. However, the notion of giving retrospective or retroactive effect to S. 995 is replete with infirmities.

For a moment, let me pass on the constitutional and legal aspects of what Georgia-Pacific and Mead and Weyerhaeuser request you to do for them today. Let us just talk about the practical effect to you gentlemen as Senators from your States if you set this precedent.

It is going to mean that every one of your doors and the doors of your colleagues are now going to be open for requests for retroactive congressional relief each time there is a substantial verdict returned against a major corporation in an antitrust case, securities fraud case, or business misconduct case. Enactment of this retroactive proposal is literally a Pandora's box of pressure by major corporations, their friends, and the lobbyists.

By now I think you gentlemen realize the tremendous political pressure that can be mounted by just two, three, or four major corporations when they set their mind about trying to have Congress change the rules of the game retroactively. If you report this bill out favorably, the word is out to the members of the roundtable, to the N.A.M., to the clients of every major law firm in the country, including my own law firm and their clients, that in our judicial system, despite the fact that the Supreme Court renders a verdict or a decision, they are no longer the court of last resort, that the Senate Judiciary Committee will now entertain special relief legislation for major business defendants so they can get another day in court.

Let me point out your own record and the tradition of this committee, gentlemen. Just 2 years ago when the Illinois Brick legislation was brought, a number of plaintiffs' counsel sought to have that legislation enacted retroactively. It is a very fine report from this committee which conclusively found that a retroactive operation of that bill or any other substantive antitrust bill was unconstitutional. I refer you to pages 163 through 169 of that report. It is a good report. I am not going to burden you with reading it to you now, but the arguments are very clear there.

Gentlemen, in the entire history of the antitrust legislation in this country you have never enacted a major substantive provision on antitrust rights, retroactively.

Two years ago when the parens patriae provisions of the Hart-Scott-Rodino bill giving the States authority to sue you specifically said no to retroactively. In the original Clayton Act, none of the specific substantive rights given to the plaintiffs was made retroactive.

Our constitutional system places a premium on the value of fairness. We have a tradition abhorring retroactive legislation. Let me just discuss a little bit with you the original position of the Founding Fathers when they wrote and drafted our Constitution.

James Madison, in Federalist No. 44, saw the need to protect the American people from the "fluctuating policy which has directed the public councils." Legislative changes affecting personal rights, he wrote, are "contrary to the first principles of the social compact and to every principle of social legislation. They become jobs in the hands of enterprising and influential spectators and snares to the more industrious and less informed part of the community."

Mr. Chairman, if I could, I would like to offer my remarks in their entirety in the record at this time and try to make a few specific points for the members of this committee. I think I would like to follow up on some of the points made earlier by Senator Hatch, Senator East, and Senator Heflin.

First of all, let me tell you that the applicants before you today, Georgia-Pacific, Mead, and Weyerhaeuser do not come before you with clean hands, gentlemen. They do not come before you with clean hands asking for relief from the U.S. Senate. These companies have been adjudicated guilty of price fixing and price violations, not once, but many times in the past. We will run a lexis for you, gentlemen, and give you their record with respect to antitrust violations. They are not coming in here with clean hands.

Furthermore, they keep referring to sweetheart agreements. I respectfully suggest that when a lawyer is representing a defendant in litigation, if he feels he should settle, he can do so without being charged of entering into a sweetheart agreement. As a matter of fact, every trial lawyer knows that there is a time when he should settle, particularly when the facts are against him.

The fact that Georgia-Pacific's counsel were so certain and sure of themselves that they wanted to go through and try a case when other lawyers did not, should not be used against the lawyers who recognized the risks of litigation and settled. Having elected to try the cases and lost at the hands of a jury in New Orleans with Mr. Kohn and me at the trial table, the nonsettling defendants are not entitled to ask the Judiciary Committee to redeem them from poor litigation judgment. They do not come in here with clean hands.

Furthermore, gentlemen, you must realize that if you grant this legislation retroactively, in every one of your States there are persons—let us take the *Plywood* case—lumber dealers, for example, who purchase plywood over a period of years, who have rights pending now that will at the very least be affected and delayed for years while the constitutional issues are litigated. They will have the rights they have earned in the courts held up and delayed for a number of years because of this retroactive bailout.

We will give you the lists and the printouts in your own States of those individuals who you will be affecting adversely at the same time you grant this relief legislation for Georgia-Pacific, Mead, and Weyerhaeuser.

I would like to make one other comment about the Lacovara amendment. The Lacovara amendment is not a compromise. The Lacovara amendment seeks to withdraw—I might say unsuccessfully—some of the constitutional opposition from a part of the business community. It has not been successful as you will hear from distinguished representatives from the business community in the second panel who strongly oppose this legislation.

I would, however, like to refer you to and ask that you include in the record at this time the very fine constitutional statement prepared by Mr. Lacovara just 2 years ago when he was on the other side of the issue. At that time, with the *Illinois Brick* legislation pending before this committee, Mr. Lacovara said retroactivity with respect to a major antitrust provision is clearly unconstitutional.

It was well done. The points he made then are just as valid today as when he made them 2 years ago. I commend that brief which is included in your own Senate record to your attention. I will also submit it for the record here with the reporter at the conclusion of our testimony.[1]

Now a word or two about the constitutional history of retroactivity and the position of our courts. The Supreme Court has always felt that there is a presumption with respect to the validity of maintaining a rule of law.

The *Schooner Peggy* case, which was mentioned by Judge Bell and Senator Ervin, is an interesting case. In that case the Supreme Court had before it not a law which was retroactively applied but a treaty whose ratification was pending before the U.S. Senate.

That was in 1800. That was 12 years before the United States went to war with Great Britain, but at that time there were serious divisions between the United States and France. As a matter of fact, some of the warhawks in the United States were advocating war between the United States and France.

The U.S. Navy seized and captured a French schooner named *Peggy*. As was the custom, the captain and the crew members were permitted to condemn that ship and take prize money. Before the condemnation proceeding was completed and it was before the Supreme Court on a writ of error, President Jefferson and his commissioners negotiated a treaty of peace with France. Part of the language of that treaty of peace with France provided that all ships that had been captured and were in the process of being condemned and so forth would be returned. The courts upheld it.

Chief Justice Marshall recognized and said that circumstances involving great national concerns may overcome the presumption with respect to the validity of existing law, but he went on to note that in mere private cases between individuals a court will and ought to struggle hard against the construction which will by retroactive operation affect the rights of parties.

The CHAIRMAN. Senator, I believe your time is up unless you want to agree with the rest of them that you will take longer.

Mr. TYDINGS. I yield at this time to my colleagues.

The CHAIRMAN. We will put the rest of your statement in the record following the panel's presentation.

Mr. TYDINGS. Fine.

[The prepared statement of Hon. Joseph D. Tydings follows:]

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[1] Mr. Lacovara's testimony can be found on pages 213 through 230 in committee hearing serial No. 96-2 entitled "Antitrust Enforcement Act of 1979," S. 300.

Statement of Joseph D. Tydings
Before the Committee on the Judiciary
United States Senate

February 10, 1982

Mr. Chairman and members of the Committee:

I am Joe Tydings, a member of the law firm of Finley, Kumble, Wagner, Heine, Underberg & Casey.

I have a substantial interest in the legislation you are considering this morning. I am co-lead counsel for the plaintiffs in the Plywood case, and was with Mr. Kohn at the trial table in New Orleans against Georgia Pacific, Weyerhaeuser and Willamette. I was a member of the original Plaintiffs' Steering Committee in the Corrugated case. I did not participate in the Corrugated trial against Mead, assigning one of my younger partners to assist Mr. Susman in that important trial.

I have been an active trial advocate before the judges and juries of Maryland and other jurisdictions including California, Pennsylvania, Arizona, Texas, Louisiana and New York for over twenty-nine years this November, with 6 years out to serve in the U.S. Senate.

I served as U.S. Attorney for Maryland when our office was limited to a total of seven assistants. I am proud that a number of my former assistants have contributed to their state and nation by serving as Attorney General of the United States, Attorney General of Maryland, United States Attorney for Maryland, Circuit and District Court Judges and legislative leaders in my state.

I was privileged to serve as Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery for five years from 1966 to 1971 with such distinguished colleagues as your present Chairman, Senator Strom Thurmond of South Carolina, Senator Sam Ervin of North Carolina and the late Senator Phil Hart of Michigan and Senator John McClellan of Arkansas -- all of whom waived their seniority to permit me to serve as Chairman. Our subcommittee drafted, introduced and passed legislation including the Federal Magistrates Act, the Federal Jury Selection System, the Federal Multi-District Litigation Act, the Federal Judicial Center, and other legislation to stregthen and improve our Federal Judicial System.

I am testifying today at the kind invitation of your Chairman to counsel you strongly against the suggestions to amend the proposed contribution legislation (S.995) in order to give it retroactive effect. My testimony today will be confined to the question of retroactivity of S.995. The present version of the Bill would 1) provide for contribution of damages among defendants or co-conspirators in antitrust price-fixing cases and 2) establish a proportional claim reduction formula for purposes of determining the effect of settlements in such cases on non-settling defendants. S.995 would create substantive rights and liabilities since present law does not allow contribution in such cases and provides for claim reduction on a pro tanto or dollar for dollar basis.

The original proposal before your Committee would apply to actions "commenced after the date of enactment" of the Bill. However, the suggested amendments would make the Bill applicable in whole or in part to cases pending in the courts today. Specifically, these proposed changes would have a dramatic impact on the recovery rights of plaintiffs who have succesfully prevailed before judges, juries and appellate courts in the Corrugated Carton and Plywood Class Action Antitrust cases, and the Burlington Antitrust case, not to mention the scores of cases now being settled and litigated.

The notion of giving retroactive effect to S.995 is replete with infirmities. In the interest of avoiding duplication and expediting these hearings, my opening statement will address the broad public policy issues and the constitutional problems of such an approach. My co-lead counsel in Plywood, Mr. Harold E. Kohn, will offer a statement focusing on what this legislation would do to the thousands of small hardware and lumber stores who are plaintiffs in Plywood, and Mr. Stephen D. Susman will speak on the rights of 200,000 businesses, which would be arbitrarily abrogated by retroactivity.

This proposal, as you probably know, is already being referred to as the "Georgia Pacific-Mead-Milliken-Senate-Bailout of 1982."

Forgetting for a moment the legality or justice of S.995, one of the practical effects of its passage will be to open every one of your doors and the doors of your colleagues to requests for retroactive congressional relief each time there is a substantial verdict returned against a major corporation in an anti-trust case or a securities fraud case, or a business misconduct case.

If you enact this retroactive proposal you open a Pandora's Box of congressional pressure by major corporations, their friends and lobbyists, whenever they lose a major damage suit.

By now gentlemen of this Committee, you realize the tremendous political and financial resources of one of these multi-billion dollar corporate enterprises. If you report this bill out favorably, the word is out to the members of the Business Roundtable, the N.A.M., to the clients of every major law firm including my own -- that in our Judicial System, the Supreme Court of the United States is no longer the Court of last resort and that the Senate Judiciary Committee will now entertain special relief legislation for major business defendants who feel they need another day in court. That is a no-win situation for you, your constituents, and our constitutional democracy based on a rule of law -- not men.

Historical Aversion to Retroactive Legislation

Our constitutional system of government places a premium on the value of fairness and consequently has a tradition of abhorring retroactive legislation. The Founding Fathers were sensitive to the evils of applying new rules to the past conduct of citizens. James Madison saw the need to protect the American people from the "fluctuating policy which has directed the public councils." The Federalist No. 44, at 279 (Lodge ed. 1888). Legislative changes affecting personal rights, he wrote, are "contrary to the first principles of the social compact and to every principle of social legislation." They "become jobs in the hands of enterprising and influential spectators, and snares to the more industrious and less informed part of the community." Id.

The principle of prohibitng legislation which retrospectively defines the rights and obligations of citizens was selectively incorporated into the Constitution. Under the contract clause, states are prohibited from enacting legislation "impairing the Obligations of Contracts" (Article I, §10, cl. 1). And the Congress is specifically prohibited from passing ex post facto laws by Article I,§9, cl. 3, although that clause has been interpreted to apply only to criminal cases, Baire v. City of Columbia, 378 U.S. 347 (1965). In addition, the due process clauses of the Fifth and Fourteenth Amendments are broader protections encompassing this principle.

The historical bias against retroactive legislation is manisfested in court decisions involving statutes which are silent as to the time they are to take effect. While the courts recognized that retrospective application of civil statutes was permissible if such application was otherwise constitutional, the rule of statutory construction developed that absent a clear expression of legislative intent to the contrary, a statute is presumed to have prospective effect only. United States v. Heth, 7 U.S. 399 (1806). And while Chief Justice Marshall recognized that circumstances involving "great national concerns" may overcome such a presumption, he noted that in "mere private cases between individuals, a court will and ought to struggle hard against a construction, which will by retrospective operation, affect the rights of parties." United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Early in this century, the Supreme Court again reaffirmed the presumption of a statute's prospectivity declaring:

> The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).

Although recent Supreme Court pronouncements, such as Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), have abandoned a "presumption" of prospectivity where a statute is silent, the Supreme Court has incorporated the historical policy against retroactivity in articulating the rule that an appellate court shall apply the law in effect at the time it renders a decision, unless such application would work a "manifest injustice." Implicit in the concept of "manifest injustice" is the idea that obnoxious considerations are inherent in the application of new law to pending cases.

In the antitrust field especially, Congress has resisted attempts to legislate retroactively. For example, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, containing the parens patriae provisions, was made not to apply "to any injuries sustained prior to [the] date of enactment." An earlier draft which would have authorized application of the parens patriae provisions to pending actions was rejected. Similarly, by enacting Section 4A of the Clayton Act, Congress gave the United States authority to sue, but only prospectively.

During the Ninety-Sixth Congress, attempts to make the so-called "Illinois Brick" bill (S.300) retroactive were very controversial. The Judiciary Committee concluded that retroactive application would be unconstitutional. Senate Judiciary Committee, Report on S.300, S. Rep. No. 96-239, Ninety-Sixth Cong., 1st Sess. 163 (1979).

Constitutional Defects in Applying S.995 Retroactively

While the concept of prospectivity is deeply rooted in our Constitution and legal system, it is certainly the prerogative of Congress to apply a civil statute retroactively if no constitutional infringement occurs. However, the application of the proposed contribution legislation to pending cases raises serious constitutional questions, principally under the due process clause of the Fifth Amendment and the separation of powers doctrine.

I do not have time available to verbally articulate an exhaustive legal analysis of the constitutional questions presented by retroactively applying the contribution Bill. I commend to your attention the very fine brief of Lowell E. Sachnoff, Esq., of the Chicago Bar, which sets forth a comprehensive discussion of the Constitutional questions presented by retroactivity. I would also like to note the fine analysis submitted by Philip Lacovara to this Committee during the last Congress in which he forcefully and articulately objected to retrospective application of the Anti-Illinois Brick Bill for constitutional reasons. Instead, I would like to outline those considerations that weigh most heavily in rendering retroactivity of S.995 constitutionally defective.

Though there is no express prohibition in the Constitution against retroactive enactment of civil statutes, "the retrospective aspects of legislation, as well as the prospective aspects must meet the test of due process, and the justification for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

In spite of the many decisions which the Supreme Court has rendered on the subject of retroactive legislation, no single or clear due process standard has emerged. The Court's decisions have, for example, turned on whether retroactive application was "arbitrary and irrational," Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), or "harsh and oppressive." United States Trust Company of New York v. New Jersey, 431 U.S.1 (1977). Results have varied depending on whether the effect was to abrogate "vested rights," F.H.A. v. The Darlington, Inc., 358 U.S. 84 (1958); a party has changed his position in reliance upon preenactment law, United States v. Darusmont, 49 U.S.L.W. 3489, 3490 (January 13, 1982); retroactivity defeats the reasonable expectations of the parties, Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922); and whether retroactivity is necessary to achieve compelling policy goals of the statute in emergency cases, Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934). The absence of a definitive standard makes the likelihood of litigation challenging retroactive statutes high and the outcome in those cases uncertain.

Professor Hochman, in an article in the Harvard Law Review that has been widely cited by the courts, has proposed a general approach which involves weighing three factors in any particular case:

1. The nature and the strength of the public interest served by the statute;

2. The extent to which the statute modifies or abrogates the asserted preenactment right; and

3. The nature of the right which the statute alters.

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, Harv. L. Rev. 692, 697 (1960). The Supreme Court has not formally adopted this approach, but it has employed a somewhat similar standard for purposes of giving meaning to the term "manifest injustice" in the Bradley case referred to before. Because the "manifest injustice" standard is rooted in due process considerations, Professor Hochman's framework is an appropriate test for evaluating the due process question.

Under the Hochman approach, the following considerations are significant:

1. The nature of the public interest served by S.995. It is well settled that Congress is the best judge of whether a particular statute serves the public interest, especially if the statute seeks to adjust the burdens and benefits of economic life within a regulatory scheme such as the antitrust laws. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). While respectfully deferring to the ultimate judgment of Congress, I submit that retroactive application of S.995 serves no discernible public purpose.

The contribution legislation serves the public purpose of allocating damages in a fairer manner among the parties in a price-fixing scheme. However, retroactive application of S.995 would clearly defeat such purpose. In the Corrugated and Plywood cases, settlement agreements -- the fairness and adequacy of which were approved by the district courts -- have been executed in reliance upon a pro tanto claim reduction formula and a no contribution rule. Retroactive application of proportional claim reduction to these cases will have the result of defeating the plaintiffs' right to claim the balance of full treble damages against non-settling defendants while providing a windfall benefit to the latter.

Regardless of the existence of a public interest attaching to S.995, it is minimized by the fact that it affects the interests of private cases. The Supreme Court has upheld retroactive statutes affecting the interests of private parties. However, any attempt by the proponents of retroactivity to analogize this situation to the public interest involved in those cases would be embarrassing. A number of cases, for example, arose in the context of emergency legislation enacted during the Depression. See, *e.g.*, *Home Building and Loan Association v. Blaisdell*, *supra*. In more recent cases, the Supreme Court has sustained retroactivity to uphold the claims of plaintiffs whom significant social legislation is designed to protect, *e.g.*, The Black Lung Benefits Act of 1972 (*Usery, supra.*). Certainly, the "public interest" in this case is dwarfed by comparison. Moreover, I am not aware of any case upholding retroactive application of parochial legislation such as this for the benefit of adjudicated wrongdoers and I believe that the due process clause would not permit it.

2. *The extent of the abrogation of the asserted preenactment right*. Ironically, the retroactive amendments would adversely affect only the rights of the class of plaintiffs which the Clayton Act is designed to protect: by retroactively substituting a proportional claim reduction formula for a *pro tanto* formula, it would reduce the total recovery of treble damages, while the adjudicated price-fixers would be partially relieved of a preenactment obligation.

More importantly, retroactive application of S.995 would mean that the plaintiffs' right of recovery for damages equal to the difference between pre-enactment and post-enactment recovery is permanently extinguished. This is not a situation where the right of recovery has been temporarily suspended. Ochoa v. Hernandes Y. Morales, 230 U.S. 139 (1913). The diminution of value in the pre-existing right is substantial enough to warrant striking down the retroactive statute. See, Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922).

When weighed in conjunction with the absence of a substantial public interest in making S.995 retroactive, the curtailment of plaintiffs' damages in favor of the wrongdoers is substantial.

3. The nature of the right affected by a retroactive statute. The third pattern established by the cases is to strike retroactive statutes which affect rights that have been "perfected" or vested. The degree to which the plaintiffs have asserted and enforced their rights in the Corrugated and Plywood cases is substantial and it cannot be said that their claims are speculative. In each case, these rights have been reduced to judgments and in some instances affirmed by the Court of Appeals.

Reduced to a "gut" level, it is difficult, if not impossible, to see how passage of a retroactive amendment in this situation comports with fundamental fairness and due process of law. The amendments would be special interest legislation of the worst kind. Their proponents are corporate antitrust violators who, after repeatedly rejecting reasonable settlement offers from the plaintiffs (particularly, in the light of damages adjudicated by the trial court), forced the plaintiffs into very costly and time-consuming litigation which ended in substantial judgments against them. Now, after having had their day in court, they unscrupulously seek to legislatively overturn those judgments and reduce the amount of plaintiff classes' judgment awards through retroactive application of the claim reduction provision. In other words, having played by the rules of the game and lost, they seek to use their economic power and influence to change the results.

I would like to comment briefly on the bearing of the above discussion to the amendment circulated by Philip Lacovara. In essence, the Lacovara proposal would apply the proportional claim reduction provision to pending cases at the time of its enactment, unless a reviewing court determines that to do so would result in "manifest injustice." This proposal does nothing more than incorporate the rule of statutory construction adopted in Bradley. Indeed, this inclusion is redundant since the deletion of an applicability clause would seem to have the same effect. Based on the foregoing discussion, it is unlikely that a court would apply S.995 retroactively under the Lacovara proposal because to do so would be "manifestly injust." However, I should add that the provision merely creates confusion and ambiguity and encourages additional litigation which would be aimed at determining the meaning of the proposed language.

A second area of significant constitutional concern is that giving retroactive effect to S.995 would place the Congress in the position of pulling the rug of deciding what the law is from under the Judicial branch of Government. The doctrine of separation of powers was articulated very early in our Constitutional history in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where Justice Marshall recognized the distinct "province and duty of the Judicial Department to say what the law is." Id. at 177.

The authority of the Congress to enact a contribution bill is clear and was so recognized by the Supreme Court in Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S.Ct. 2061 (1981). There is, however, a fundamental difference between Congressional change of a rule of law which applies to future cases, and changing a rule of law which applies to pending cases when the effect is to repudiate a Supreme Court interpretation of the preenactment law. By giving retroactive effect to either the contribution provision or the claim reduction measure in S.995, the Congress would be restating the prior law in this area, a point to which the Supreme Court has already clearly spoken in Texas Industries. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

In our system of government, matters concerning the separation of powers of the co-ordinate branches of government have been among the most sensitive and delicate. As between the Congress and the Judiciary, we have a strong common law tradition that although a Court's pronouncements may apply to passed conduct, the Congress' function is to declare law for the future. See Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 789 (1936). There have been in the past, and will be in the future, exigent circumstances requiring the Congress to enact legislation which runs the risk of ultimately being declared violative of the separation of powers doctrine. Special interest legislation such as this for known price fixers certainly does not warrant upsetting the delicate constitutional relationship between the Congress and the Judiciary.

In the final analysis, no constitutional scholar can predict whether or not retroactive application of the contribution bill would be upheld by a court. It is very clear, however, that retroactivity poses serious constitutional issues which could only be resolved through protracted and expensive litigation. And the pressure to resort to court battles to get a definitive statement from the court on those issues will be enormous. Plaintiffs will use constitutional and other arguments to reopen approved settlements or to frustrate approval of settlements previously agreed upon. Defendants who previously settled will vigorously fight to retain the prior agreements and, if the right of contribution is made retroactive, may nevertheless be fending off actions by nonsettling defendants for contribution. Because of the substantial constitutional questions raised by retroactivity, careful draftsmanship cannot protect against the chaos that will ensue.

This proposal is a global attempt to overturn the Supreme Court's clear decision upholding the law of contribution between guilty joint tort-feasors to innocent victims which has stood for over 150 years in the courts of this nation and for decades before in the common law court of England.

I take second place to no one in my admiration for President Franklin Roosevelt as one of our greatest leaders in the Twentieth Century. But one of my father's (the late Senator Millard Tydings of Maryland) finest hours was in 1938 when he and Senator Bart Wheeler of Montana organized the United States Senate to defeat President Roosevelt's proposal to reorganize the Supreme Court by adding three new justices. The President sought to void our historic separation of powers by "packing" the Court because he did not agree with decisions of the Supreme Court defining the law of the land. The situation today is not a perfect analogy but the public policy issue is the same. We are a government of laws and institutions not a government of special interests who scoff at our judicial system, our laws, our courts and our juries.

As a government of laws, we are disdainful of those who consider themselves above the law. A Milliken executive involved in his company's price fixing conduct, has callously stated,

> It is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to any one who seeks to improve his own business situation by establishing a monopoly.

I would like to believe that our system of justice does not reward or affirm a known price-fixer's cavalier attitude towards the antitrust laws.

Mr. Chairman, this concludes my prepared statement.

STATEMENT OF STEPHEN D. SUSMAN, ESQ., LAW FIRM OF SUSMAN & McGOWAN, HOUSTON, TEX.

Mr. **Susman**. Senator Thurmond, my name is Steve Susman. I am from Houston, Texas. I was one of the lawyers that assisted Mead in exercising its constitutional right to a jury trial.

Somehow during the course of these proceedings we have forgotten the fact that Mead in fact exercised that right and was found by a jury of its peers to have engaged in a price fixing conspiracy that lasted for 12 years. It cost 200,000 American businesses in actual damages $2.5 billion.

Now Mead is coming here and saying it was unable to exercise its constitutional right. It exercised that right. It knew the odds. It was given opportunity after opportunity to settle, at first for $3.2 million. Even now it is being asked only to pay a small premium for the exercise of its constitutional rights, and yet it refuses to do so because there is a possibility that this body will bail it out.

If Mead pays the $75 million being asked by the Steering Committee—and I have told Mead and everyone I can that I would take to the Steering Committee any offer in excess of $50 million—that, with the $325 million we have already gotten, will return for the class $400 million. That is 16 percent of the actual, not treble, damages that the class sustained.

Is that blackmail? Is that extortion? Where is the economic clout in the system of joint and several liability in the absence of contribution? Certainly not with the injured consumer.

I have a submitted statement that details the *Corrugated* case and I would like to respond here to some of the arguments that have been made.

Judge Bell has come in with a so-called compromise. The compromise would apply claims reduction in pending cases retroactively but contribution only prospectively. That is a real gerrymander if I have ever heard one! It is heads the price fixers win, tails the price fixers win.

Judge Bell admits that this is a new way of computing damages. Those who are candid here today will say that what this is all about is really an attack on joint and several liability. That is what it is all about. If that is what it is about, why do we not have hearings on joint and several liability and not about applying a new law retroactively to a case that has already been tried.

This is not a compromise. It is a total victory for Mead, Georgia-Pacific, and Milliken, without jeopardy to the settling defendants. It is a total loss to the plaintiffs.

Judge Renfrew gives the example of some small company unnamed in the *Corrugated* case who had one-half of 1 percent of the market, paid $3 million, and had to sell a plant. I do not know which company that was, but I do know in the *Corrugated* case we entertained from every settling defendant an offer to have an accounting firm determine what that company could afford to pay without destroying or undermining the competitive viability of that company.

I represent businesses who cannot afford and who do not want to blackmail or destroy people who are selling cardboard boxes. They depend on the Meads of the world. They depend on the small company. It does not help us to put Mead out of business. We want Mead to remain a viable competitor and Mead has received the offer from the plaintiff's steering committee that you pay us what you can afford to pay and still remain a viable competitor.

All you have to do is say I can only afford to pay you $5 million. We would turn your financial information over to Arthur Anderson or Price Waterhouse, and, if they agree that that is all you can afford to pay and remain a viable competitor, that is what we will take. Is that blackmail? Is that extortion when it means that 200,000 businesses are going to still get less than 16 percent of what they were damaged? Of course not.

Judge Renfrew points out that there were 14 companies in the *Corrugated* case that were found not to have been involved in the conspiracy after having paid money in settlement. Sure, there were 14 companies that were exonerated by the jury, but that is only because we the plaintiffs' counsel in that case were not pushing to have the jury name every single defendant as a coconspirator. Trials can only last so long. This one lasted 4 months as it was. The jury found that 20 companies were implicated in the conspiracy. Had it lasted for another 4 months, maybe we could have proved that 37 were implicated.

However, we are having problems right now collecting and getting this Congress to allow us to collect a possible judgment against Mead of $700 million. What in the world would we need a judgment of $1.5 billion for? Nothing.

It is pointed out that the plaintiffs knew of the possibility that Congress might adopt a rule of claims reduction and yet urged approval of the settlements notwithstanding. Of course. What were we supposed to do? Wait around with these settlements forever until Congress finally rejected claim reduction unequivocally? That may never happen.

We pointed out simply that the argument that claims reduction should be the rule should be made at a different time and in a different place, not in connection with approval of the settlements.

We were aware of existing law. The Supreme Court unanimously confirmed that we knew what we were talking about. The eighth circuit decision did not involve claims reduction, only contribution, and no bill was pending in Congress at the time we accepted $298 million in settlement.

It is pointed out that Mr. Susman has too much power since he has the power to relieve Mead of this awesome liability. I ask what prevents Mead from going directly to the class that I represent and offering a settlement?

Not a single large-class member has contacted the steering committee to say you are asking too much from Mead. Mead has never suggested to the court or the class that we throw this settlement offer out to the class and see what they say. Not what Susman says, but what the businesses out there say. Why has Mead not gone to these businesses and tried to settle with them?

Senator Ervin talks about collusion between the plaintiffs and the defendants and the danger of sweetheart settlements. In the first place, that was present here. If it were present, the trial court would not have approved the settlements. Rule 23(e) of the Federal Rules of Civil Procedure which requires trial court approval prevents sweetheart settlement contracts from being entered into.

We are again accused of blackmail and extortion. That is the biggest joke of all. No one pressured those defendants to come to us. They knew their liability under existing law. They calculated that and they came in.

I am interested in the statement of Donald Kress, the son of George Kress who was here testifying in 1979 about the extortionist blackmail practices of the plaintiffs. He pointed out that his company had to pay $5.5 million although it was totally innocent.

However, he did not point out that 11 of its managers were named by the Federal Government as coconspirators in the *Corrugated* case, two of those managers were later implicated in testimony and depositions and at the criminal trial of having been engaged in price fixing communications, and three of those managers, including Mr. George Kress himself, informed us that if we took their depositions they would invoke the fifth amendment and decline to answer questions about pricing communications. That is the kind of innocence that caused Mr. Kress to pay $5.5 million.

Some of the questions that were asked I think are insightful. Senator Thurmond asked Senator Ervin: "Will not settling defendants have to litigate the constitutionality of S. 995?" Senator Ervin did not respond directly. He said they may have to litigate but they cannot lose.

That dodges the issues. Certainly they will have to litigate, and we the plaintiffs in the *Corrugated* case are going to make them litigate because there is too much doubt as to the constitutionality of applying S. 995 retroactively for us to fulfill our fiduciary duties to the class by settling at a small amount.

Certainly Mead would offer us a couple million dollars if their liability were pegged at $53 million by making S. 995 retroactive, but could we settle for $3 million when respectable scholars like Charles Alan Wright, for example, say that there is grave doubt about the constitutionality of making S. 995 retroactive? If there is grave doubt, we are going to have to litigate that issue. We are going to have to litigate it through the courts and it will hold up the settlements and the distribution of the settlements for a long, long time.

Senator Thurmond asked Judge Bell: "Is it fair to change the rules in the middle of the game?" The answer Judge Bell gave was that the plaintiffs can always get out of this change of rules by showing manifest injustice. We won one case already. Why do we have to win it again? Why should the burden be on the plaintiffs to show manifest injustice? Why should it not be on companies like Mead and Georgia-Pacific to establish, as they claim they have, a common law right of claims reduction? If they have a common law right of claims reduction, why should this body say anything?

They have been found guilty. Why do they not go to the courts and make the same arguments of manifest injustice that they are making here? Why put the burden on us that we have already assumed once and won?

The argument is made by Judge Bell—he should know better—that attorneys get more fees in these cases than any plaintiff. That is absolutely erroneous. In the *Corrugated* case the attorneys fees—we are fixing to apply for fees shortly—will be less than one-third of the interest earned on the settlement funds.

It is suggested or asked by Judge Bell why can there not be partial distribution of the settlement funds in the *Corrugated* case. If he did his homework, he would know the answer to that, too. The settlement agreements specifically provide that there can be no distribution until the settlements have been finally approved. Final approval means either certiori has been denied by the Supreme Court or the time for applying for certiori has expired and no certiori has been applied for. That time has not passed.

We are told by the objectors that even if certiori is denied they will renew an attack on the settlements in the trial court under rule 60 and other types of rules that allow for postjudgment relief.

Judge Bell said that what would be fair here would be for the plaintiffs in the *Corrugated* case just to give back the dollars to the defendants and try the case again. I would be glad to give back the money to International Paper. I would even consider giving back the money in McMillan, Alton, Interstate, Consolidated, and you can go down the list. I have had none of these companies come to me and say, "Mr. Susman, refund us the money and we will go after you again in the trial court."

That is a joke. That will not happen. It will not happen because 20 of them have already been found by the jury to have been guilty of price fixing.

There will be some who will try to get their money back, those who have been exonerated by the jury because they will have a defense against me of collateral estoppel. How am I going to get around the defense of collateral estoppel? They can say I had my day in court and I lost.

However, I had my day in court under a rule of law, a regime of joint and several liability with neither claims reduction nor contribution. Because that was the rule, that is the way I tried the case to the jury and that is the way I argued the case to the jury. Because I tried and argued it that way, it happened that about 14 companies were not found to have participated in a price fixing conspiracy. I am barred by collateral estoppel or perhaps res judicata. Can you relieve me of that so I can try my case against them again?

The CHAIRMAN. Your time is about up, Mr. Susman.

Mr. SUSMAN. There are momentous effects of changing the rules in the middle of the game.

Thank you, sir.

The CHAIRMAN. If you have any further statement for the record, feel free to put it in.

Mr. Kohn, we will be glad to hear from you.

STATEMENT OF HAROLD E. KOHN, ESQ., LAW FIRM OF KOHN, SAVETT, MARION & GRAF, P.C., PHILADELPHIA, PA.

Mr. KOHN. Even a Philadelphia lawyer will not have the temerity to challenge directly the man who is referred to as the most distinguished citizen of North Carolina. I would however like to borrow something from him.

What he said is "let us consider or let us think about plain commonsense." That is a theme on which I would like to talk to you for just the few minutes allowed to me. I do not have to give you a lot about my background. Your staff can tell you.

I think one important thing is consistency. I have been testifying before this committee for 20 years. The main thrust of everything I have said has been to make the antitrust laws effective and to simplify the administration of antitrust laws.

For example, when most of the plaintiffs' bar were here asking to have the retroactive change made in the *Illinois Brick* rule of the Supreme Court, I was here all alone saying "leave that rule as it is." We do not want to change things retroactively and we do want to simplify the administration of the antitrust laws and not make them more complicated. Happily that view has prevailed.

Like Senator Tydings and Mr. Susman, I do represent a great number of defendants. I do have a general law practice. I am cognizant of the fact that when I appear before you here I appear not only as an advocate but I appear as a citizen and I appear as a lawyer. We know the problems of the administration of justice today and how complex they are. We all have a responsibility not to make them more aggravating.

Item 1, to the "commonsense." Any defendant or group of defendants has the power under the well-known device of sharing agreements to enact whatever specific arrangements they want which will protect them all from any over reaching, from any prospective abuse, from anything they may fear with respect to the untoward demands of plaintiffs or plaintiffs' counsel.

In the *Plywood* case itself where Mr. Hahn is president of Georgia-Pacific, his company is party to a sharing agreement—I have the sharing agreement if it is of any interest to the Senate—which covers 75 percent of the purchases or the sales in that industry.

The CHAIRMAN. Mr. Kohn, we will have to take a short recess here for a vote on the floor. We will return as quickly as possible and continue with your testimony.

[Recess taken.]

The Chairman. The committee will come to order. We will now resume where we left off.

Mr. Kohn, I believe you were testifying.

Mr. **Kohn**. Thank you, Mr. Chairman.

The first point I sought to make before the recess was that, if we do it the American way, the way the President wants us to do it, and let the defendants take care of themselves by the sharing agreements, they can tailor them to suit their own individual needs, they can take care of the specific case, they do not have to burden the Congress, they do not have to burden plaintiffs' counsel or anybody else.

Second, I spoke of consistency. When Judge Bell was Attorney General and Senator Bayh's bill was before you, among the many comments which were made on behalf of the Attorney General by Mr. Shenefeld was this very pertinent comment which appears in the hearings on the Equal Enforcement Act of 1979, S. 1468, June 8-12, 1979, and this is at page 7:

> For instance, instead of applying contribution to all antitrust violations, you might wish to confine it to rule of reason violations, to allow it only for noncriminal violations, the reason being that contribution has commended itself to judges as a means of spreading risk without affecting deterrence when you are dealing with unintentional torts. However, the analogy of that would be rule of reason cases in the antitrust field rather than the per se variety of case.

Here you have the most blatant, intentional, obvious kind of horizontal price fixing, which is the only subject to which S. 995 directs itself. If there ever were an instance of special legislation for the benefit of three companies that were out of step completely with the rest of the industry, went through the courts, and lost their cases, and then had you seek to upset those decisions, I cannot imagine what it would be.

The thrust of the discussion today has indicated, first, that there is no retroactivity provision before you that you can really direct your attention to; second, there really is no contribution bill before you that you can direct your attention to.

What we have is apparently now an indirect, growing attack from these people on the antitrust laws generally with this great sympathy for their small "mom and pop" businesses which, were it not for the antitrust laws, would be completely out of business today. We have people appearing, for example, on behalf of Mobil, and we all know from the press their recent record with respect to antitrust problems.

So what you have is a disguised attack, really, in a confused state, which would lead this Congress, if you accepted what they say, to apply retroactively a change which would drastically affect the entire antitrust law, the entire joint and several liability, which 99 percent of industry has had no problem coping with whatsoever for the last 90 years.

The other 25 or 30 companies in these cases have had no problem. They have been able to adjust their problems in the same practical, commonsense way that Senator Ervin would have you address your work, and they have resolved their differences.

So that the people who now say that you should apply, when they represent a private company, certain principles to legislation, when they were here presumably in the interests of the entire

United States, took a radically different approach and would have asked you not to pass this bill at the outset, let alone the retroactivity provision which they stress so strongly at this time.

I do not think it really gets you anywhere to have reasonably respectable people like ourselves referred to as blackmailers, bribers, or extortionists, particularly when the people we are committing those heinous offenses with are the very people who are testifying before you today.

I just refuse to believe that Attorney General Bell's firm, King & Spalding, which has settled a number of antitrust cases with me as well as with other antitrust counsel, would either participate in bribery, or extortion, or make a sweetheart agreement. I refuse to believe that Judge Renfrew's firm, with which we settled many cases, would be a participant in bribery, extortion, or fraud.

I think when you get that kind of argument, it once again betrays the fundamental lack of merit in the legislation that these people are espousing. It is like the old saw that you have all heard, "If the law is with you, shout about the law; if the facts are with you, shout about the facts; and if neither is with you, just shout."

I think when you call people who have participated side by side with us bribers and extortionists that you betray the fundamental weakness of the argument that you are espousing.

In class cases, more than in any other case, you have complete control of the litigation by the court, and I think that is an important element. In the *Plywood* and *Corrugated* cases, which were in the fifth circuit, you had two of the most distinguished judges presiding. Judge Pointer, for example, has been designated by the Judicial Conference as editor of the "Manual," and he is a member of the panel on multidistrict litigation cases which transfers cases all over the country.

He found that there was no abuse in what the jury had done and, as a matter of fact, he found that there was preponderant evidence of a conspiracy. I refuse to believe that the distinguished judges who sit on the Fifth Circuit Court of Appeals, which Judge Bell himself once graced, would permit extortion, would permit bribery, would permit blackmail, would decide cases without taking into consideration the law and equity.

In the *Plywood* case not a single judge on that entire court cast a vote in favor of the defendants. The three judges who decided the case decided the case unanimously. The petitions for rehearing, which were before that panel and before the court were rejected unanimously, with the court stating not a single judge voted in favor of rehearing.

So far as equity, justice, et cetera, are concerned, I think the plain common sense of it is that it is not with these three mavericks who are seeking to upset what the rest of industry is satisfied with, what the U.S. Chamber of Commerce indicated was not appropriate, when they and we appeared before that body of businessmen, and they decided that they would not espouse retroactivity. They were for contribution.

We are now told that the contribution bill that these people put before the U.S. Chamber of Commerce is a bill that they really do not want or that they do not want retroactively. They do not know what they want, except to have you bail them out of their mistakes, which they alone made because of their own ill-advised stubbornness.

There is simply no reason why the U.S. Congress, with the problems you have today, has to be burdened with this kind of appeal from the Court of Appeals and the U.S. Supreme Court.

There was some reference, which I think is probably in the same vein, to the blackmail, extortion, et cetera, about counsel fees. If this were not a serious gathering, I might comment that in about 12 minutes the counsel fees paid to defendants for these three companies will pass the amount actually in controversy.

I have never seen such an aggregation of distinguished lawyers from all over the country pounding away at a Congress, such a conglomeration of lawyers at all levels in this litigation, and I just do not think they get anywhere by that kind of invidious remark about people who are on the other side and trying to perform their duty, not that we are excessively thin-skinned or particularly concerned about it.

One of the problems with the proposed legislation, assuming that we knew which bill was actually before the committee today, is the ill-advised way in which it has been drawn. You will remember that the same problem existed to some extent with respect to the measures to overturn the *Illinois Brick* rule. It is all the more reason why that kind of problem should be left to the courts.

If they are right that the reduction of claims is a matter which is within the cognizance of the courts, then, as several Senators have remarked, they do not need this legislation. And if they are wrong, then I do not see any more reason, and I think most fair-minded people would say, there is no more reason to believe anything else they say, if they are wrong on that very basic concept.

Seeing the light, I will close without being admonished to, simply pointing out that, if you do apply common sense to what is before you, you are going to vote these bills down. If you want a more exhaustive examination of the antitrust laws—which I do not think is necessary—this is neither the time nor place to embark on that inquiry.

The CHAIRMAN. Thank you very much.

Mr. KOHN. I would like, Senator, please, to have my prepared statement incorporated in the record. Copies have been furnished.

The Chairman. Without objection, that will be done.

[Prepared statements of Harold E. Kohn and Stephen D. Susman follow:]

STATEMENT OF HAROLD E. KOHN

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

FEBRUARY 10, 1982

Re: S.995 To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, of 4C of the Clayton Act.

On several occasions in recent years, I have testified before the Judiciary Committee (or the prior Subcommittee on Antitrust and Monopoly) with regard to legislative proposals for contribution among Defendants in price-fixing cases.

Recently, the attention of your Committee has been focused on a proposal (advanced primarily by three corporations, Mead, Georgia Pacific and Weyerhaueser, which have been found guilty of price fixing), to apply contribution retroactively. Congress is being asked to upset the verdicts of two juries, sustained by two distinguished District Court judges in the 5th Circuit and, in the Plywood case, affirmed unanimously by the Judges of the Court of Appeals of the 5th Circuit (with not a single Judge voting in favor of the Petitions for Rehearing).

Your Committee is urged to take notice of the following significant factors, discussed at somewhat more length in the exhibits, which will be referred to by me at the hearing on February 10th.

(1) The retroactive provision is special legislation demanded by three stubborn and ill-advised forest product corporations, out of step with every other company in their own industry.

Their own former counsel, Irving Shapiro, the former DuPont Chairman, and an active leader of the Business Roundtable, withdrew from the lobbying effort because of this division within the industry, because "Congress will pronounce a plague on all factions and no legislation will pass." (See also Exhibit "K".)

(2) Mead and Georgia Pacific have burdened an already overburdened Senate at a time of critical domestic and foreign

stress with one of the most heavy-handed and insensitive lobbying campaigns in recent years.

(3) Mead and Georgia Pacific, to put it most kindly, have indulged in a series of inconsistent representations as to: (a) amounts involved in the particular litigation with which they are concerned and (b) their financial ability to pay those amounts. Amounts listed by Georgia Pacific in its Annual Reports and in its Briefs and Motions before the Court of Appeals for the 5th Circuit and to the United States Supreme Court over a period of three years are now claimed by that corporation to be "significantly excessive".

(4) We believe the retroactivity provision is unconstitutional. But whatever doubt there may be as to this opinion, there is no doubt whatsoever that Courts will be bogged down for years with litigation on the issue, at great expense to the judicial system and to all of the parties involved, for the benefit primarily of lawyers.

(5) There is some confusion as to what provision or provisions for retroactivity your Committee is being asked to consider. Mead and Georgia Pacific apparently now realize that their original proposal, which applied the Act without qualification to all pending price-fixing litigation, cannot be enacted. They thereafter circulated, among other retroactivity proposals, the so-called "Lacovara Amendment". That "Amendment" is incomprehensible in part, is confusing throughout, and will undoubtedly bring on prolonged litigation, as Chief Justice Burger fears.

(6) The retroactivity debate is premature. S.995, as originally introduced, is patently defective, as is pointed out in prior testimony and as appears to be confirmed by the Opinion of Chief Justice Burger when the Supreme Court denied contribution in Texas Industries, Inc. v. Radcliff Materials. The Chief Justice pointed out some of the many problems which must be dealt with in determining contribution, most of which are not covered in the original S.995.

Assistant Attorney General William F. Baxter, in charge of the Antitrust Division, has submitted a different bill to the Committee, leaving open the question of retroactivity. (See Exhibit "H".) That Bill also is defective, in that it also does not address manifest problems which have to be covered.

(7) No one has yet demonstrated why any contribution bill is necessary. The antitrust laws have functioned for 90 years without contribution. No company has thereby been destroyed or bankrupted. No defendant which has approached litigation in a practical, businesslike and sensible manner has been unjustly or harshly penalized. Literally hundreds of major corporations in the United States have been able to cope with the problem of restitution for antitrust violations despite the absence of contribution.

Indeed, defendants always have the right of self-help to dispose of the problem, by executing "sharing agreements", which allocate damages among them, as they see fit, tailored to the specific needs of their litigation, without interference from plaintiffs, Courts or Congress.

(8) The proposed legislation does not provide for contribution in litigation against defendants who honestly thought they were not violating antitrust laws (in suits alleging exclusive distributorships, refusals to deal, tie-ins, predatory pricing, and attempted monopoly). Why then should Congress help defendants who have been found to have engaged in the crassest criminal horizontal, conspiratorial price fixing? Mead and Georgia Pacific knew precisely what they were doing, did it intentionally, indeed made it a way of life, exposed by litigation in many of their product lines.

We, therefore, respectfully urge your Committee to rid itself and the Senate of this unnecessary hornet's nest by voting down both retroactivity and contribution. The Courts and the litigants can and will continue to dispose of antitrust matters case-by-case under the existing law, as they have done successfully for 90 years.

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MEMBERS
DISTRICT OF COLUMBIA BAR

April 22, 1981

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Re: S. 995

Dear Senator Thurmond:

The BNA Antitrust Trade Report No. 1010 dated April 16, 1981 reports at pages A-8 and 9 upon the introduction of your Bill to allow defendants in price fixing suits to claim contributions from co-conspirators.

When a similar Bill was before the Subcomittee on Antitrust, Monopoly and Business Rights two years ago, in June, 1979, I testified in opposition to the pending Bill, which had been introduced by Senator Bayh.

My testimony is reported in the printed transcripts of the hearings, Serial No. 96-27, June 8 and 12, 1979, the First Session on S.1468, pages 91-109. Subsequently, I wrote to the Judiciary Committee under dates of June 19 and 22, 1979. Those letters appear at pages 185-6 and 188-191 of the same printed transcript.

On behalf of myself and other members of the Bar who are experienced in antitrust matters, I respectfully request the right to appear and to testify in opposition to the now pending Bill, S.995.

The ATRR also reports the introduction of yet another Bill to overturn partially the decision of the United States Supreme Court in the Illinois Brick case, introduced by Senator Baucus, S.931.

Many antitrust lawyers and others, including myself, have testified on numerous occasions before the Antitrust Subcommittee in opposition to Bills which would set aside the Illinois Brick decision. This testimony was presented over the period of many years on a variety of issues. I respectfully request an opportunity to testify on the current Bill.

It is my understanding that legislation has been introduced in the House similar to your Bill S.995, by the Honorable Jack Brooks, HR 1242 and I am taking the liberty of sending a copy of this letter to him with a similar request that I be permitted to testify on his Bill.

Very truly yours,

Harold E. Kohn

Harold E. Kohn

STATEMENT OF HAROLD E. KOHN WITH RESPECT TO PROPOSED AMENDMENT PROVIDING FOR CONTRIBUTION AND REDUCTION OF RECOVERABLE DAMAGES

The proposed amendment to S-390, which amendment would provide for contribution and for the reduction in recoverable damages against one defendant where another defendant has settled, is extremely ill-advised and should not be adopted.

The proposed amendment would change substantive and procedural rules which have been in effect for almost a century, since the adoption of the antitrust laws, and which have worked extremely well during that period. It has always been understood that there is no right of contributionship on the part of one joint antitrust defendant against another. See, e.g., Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960).

This principle has encouraged the settlement of such litigation, a factor of major importance because of the complexity of antitrust litigation, and has been a factor in discouraging violations of the law because of the amount of the monetary risk entailed.

Recently, the Court of Appeals for the Eighth Circuit in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 1979-1 CCH Trade Cases ¶62,485 (8th Cir, February 27, 1979), held that there should be a right of contribution. That case represented a very peculiar fact situation, of little or no general application. In essence, it appears that the principal defendant, who was primarily responsible for a monopoly violation, had conspired with the plaintiff to effect a release for a relatively modest monetary consideration because of other mutual interests. The less guilty codefendant was then made the principal subject of the suit for damages, and the Court thought there should be some equitable contribution between the two defendants to adjust a patently inequitable and collusive situation.

The situation in the ordinary price-fixing case, the most typical kind of Section 1 violation, and the violation of most immediate concern at the present time, is entirely different. The conspirators are all on a par and there is no monopolization claimed.

Several Courts have already recognized this distinction. For example, as appears in Exhibit A, a portion of the transcript in the pending Folding Carton Antitrust Litigation, MDL 250, Judges Will and Robson, who are generally regarded as among the leading jurists in this field of litigation, both being on the Board of Editors of the Manual for Complex Litigation, stated that in their opinion, the Professional Beauty rule had no application in price-fixing cases.

In a similar situation, Judge Singleton in the Northern District of Texas in the Corrugated Container Antitrust Litigation, MDL 310, held to the same effect refusing to permit claims among the defendants for contribution. See Exhibit B.

In a somewhat analogous situation, Judge Cahn in the Eastern District of Pennsylvania refused to permit the filing of such a claim on the ground that it was not timely, citing another decision of the Eighth Circuit, In Re Cessna

Distributorship Antitrust Litigation, 532 F.2d 64 (8th Cir. 1976). See Exhibit C.

The primary effect of such legislation establishing a right of contribution, which has uniformly been rejected by the ablest Courts, would be to deter settlement. The most concrete evidence of this is the position taken by major defendants in the pending price-fixing litigation such as Folding Carton Antitrust Litigation; Corrugated Container Antitrust Litigation; Eastern Sugar Antitrust Litigation, MDL 201A; and Fine Paper Antitrust Litigation, MDL 323.

Those defendants who do not wish to settle and who have opposed strenuously the settlements by other defendants have filed crossclaims seeking contribution, and those who have settled or who want to settle have opposed such claims and are contending that there is no such right of contribution. It is particularly significant that in some situations the same corporation which has an interest in settling one case, but not another, has followed this pattern, taking conflicting positions in the two cases, and law firms which represent two different defendants in two different cases have been equally inconsistent.

The second paragraph of the proposed amendment will likewise discourage settlement because no plaintiff will accept an amount from one defendant which would adversely affect his right to recover against the remaining defendants. At the present time, and again the system has worked extremely well for almost a century, the only deduction from the trebled judgment is the actual amount received from the settling defendants. There is no reason whatsoever why any greater amount should be deducted or why treble the proportion should be deducted, except to make life easier for those who contemplate violating the antitrust laws. The only practical deterrent to violation, in view of the tremendous profits received by violators, is the treble damage liability. To weaken it at this time in any way would be a retrogressive measure which could have the approval only of the most predatory element of the business community.

As the Courts have recognized, price fixing and related violations of the antitrust laws are totally different from negligence cases and other litigation, as to which various states have enacted joint tort-feasor statutes. Those are not intentional injuries, the amounts involved are totally different, and the litigation is much less complex and is more routine.

Accordingly, because the proposed amendment would make violation of the antitrust laws more attractive, would militate against the deterrent effect of the antitrust laws, and would discourage settlement of such litigation, your Committee is respectfully urged not to approve the amendment.

May 11, 1981

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DISTRICT OF COLUMBIA BAR

June 12, 1981

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Re: S.995
Contribution in Antitrust Litigation

Dear Senator Thurmond:

You will recall our prior correspondence and my testimony before your Committee in 1978 and this year with respect to proposed legislation providing for contribution among defendants in antitrust litigation.

It has come to our attention that certain large corporations in the forest product industry, which have unsuccessfully contested such suits, are incorrectly stating to members of the Senate that plaintiffs have unreasonably insisted upon excessive payments and have refused to settle such litigation on a reasonable basis.

The truth is exactly the opposite.

Consider, for example, the Plywood litigation pending in the District of New Orleans, under the supervision of Judge Sam C. Pointer, who was specially assigned to the litigation by the MultiDistrict Panel. In 1978 the jury returned a verdict for the plaintiffs, awarding them the difference between phantom freight conspiratorially set by the defendants and the actual freight paid by the defendants. The award was made against three defendants, Georgia-Pacific Corporation, Weyerhaeuser Company and and Williamette. The case is now pending before the Circuit Court of Appeals for the 5th Circuit.

Exhibit "C"

Georgia-Pacific has estimated that the damages, after trebling, may aggregate $1.5 billion. These three defendants sold approximately 45% of the product, plywood. All the other defendants, more than a score of companies, settled prior to the trial for approximately $10 million. These three companies had exactly the same opportunity and were informed in writing and orally that they could settle for the same total amount, namely, $10 million (or less).

They refused to make any offer whatsoever in any amount despite repeated efforts on the part of plaintiffs to induce them to settle and discuss settlement.

Further, during the trial, when it was manifest that there was going to be a verdict in favor of the plaintiffs because of the overwhelming evidence, as chief trial counsel I repeatedly requested counsel for the defendants to consider settlement and indicated that we would even discuss an amount less than we had previously requested. The response was an absolute refusal to discuss the matter.

The day the verdict was returned and repeatedly thereafter, I have urged the defendants to settle, again in writing and orally. Within the last few months we have told the defendants that the case could be settled for a small fraction of what they would have to pay if the verdict is sustained. They have refused to make any counter-offer whatsoever.

Under these circumtances, it is manifest they have no need for contribution legislation; that the horror stories being given to the Senate are contrary to fact, and that the problem lies with a few corporate executives who think they can stonewall the American judicial system. Happily, they are a minority, and their views should not become law.

Respectfully yours,

HEK/jc

May 27, 1981

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Re: S.995

Dear Senator Thurmond:

During the hearing on May 11, 1981 with respect to S.995 providing for contribution in antitrust cases, I pointed out in my oral testimony that the problem of contribution was of the utmost complexity, that the above Bill did not give adequate consideration to these problems, and as a result would engender years of protracted litigation. I gave several illustrations of this.

In the decision of the United States Supreme Court in Texas Industries, Inc. v. Radcliff Materials, Inc., et al., decided on May 26, 1981, Chief Justice Burger, speaking for an unanimous Court referred specifically to the issue of complexity at pages 6-7 of the Slip Opinion, a copy of which pages is attached hereto.

In essence, the problem of drafting an adequate Bill is somewhat akin to that which the Committee faced when it sought to enact legislation to set aside the decision of the United States Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720,737-747 (1977). In my testimony before the Antitrust Subcommittee on the Illinois Brick issue over a period of several years, I drew attention to the fact that it was virtually impossible to draft a Bill which would adequately cover all contingencies. As successive Bills were drafted this difficulty became manifest, and was a contributing factor in the decision not to enact such legislation.

Copies of this letter will be distributed to the other members of your committee.

Very truly yours,

Harold E. Kohn

HEK/jc
encl: as noted

even if more remote, that a single participant could be held fully liable for the total amount of the judgment. In this view, each prospective co-conspirator would ponder long and hard before engaging in what may be called a game of "Russian roulette."[8] Moreover, any discussion of this problem must consider the problem of "overdeterrence," *i. e.*, the possibility that severe antitrust penalties will chill wholly legitimate business agreements. See *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441–442 (1978).

The parties and *amici* also discuss at length how a right to contribution should be structured and, in particular, how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements. Dividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied. Some may have profited more than others; some may have caused more damage to the injured plaintiff. Some may have been "leaders" and others "followers"; one may be a "giant," others "pygmies."[9]

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[8] Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are "risk averse"; *i. e.*, they would prefer a greater certainty of a small loss to a less certain chance of a greater loss. Compare K. Elzinga & W. Breit, The Antitrust Penalties 126–129 (1976), with Easterbrook, Landes & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331, 352, n. 50 (1980). See also Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447, 452–455 (1981); Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 Bell J. Econ. 55 (1979).

[9] A small business that mimics the practices of larger companies may be participating directly in the conspiracy or simply "tagging along" with larger companies. See, *e. g.*, Markham, The Nature and Significance of Price Leadership, 41 Amer. Econ. Rev. 891 (1951); Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stan. L. Rev. 1562, 1582 (1969); Washburn, Price Leadership, 64 Va. L. Rev. 691, 693–697, 706–712 (1978). Although following industry leaders may help support

Various formulae are suggested: damages may be allocated according to market shares, relative profits, sales to the particular plaintiff, the role in the organization and operation of the conspiracy, or simply pro rata, assessing an equal amount against each participant on the theory that each one is equally liable for the injury caused by collective action. In addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle. Some *amici* and commentators have suggested that the total amount of the plaintiff's claim should be reduced by the amount of any settlement with any one co-conspirator; others strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation. See, *e. g., Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 737–747 (1977).

III

The contentions advanced indicate how views diverge as to the "unfairness" of not providing contribution, the risks and trade-offs perceived by decisionmakers in business, and the various patterns for contribution that could be devised. In this vigorous debate over the advantages and disadvantages of contribution and various contribution schemes, the parties, *amici*, and commentators have paid less attention to a very significant and perhaps dispositive threshold ques-

---

an inference of agreement, "this Court has never held that proof of parallel business behavior by itself conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954).

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MEMBERS
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June 19, 1981

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Re: S.995
Contribution in Antitrust Litigation

Dear Senator Thurmond:

Enclosed is an article which appeared in The New York Times on June 4, 1981 quoting Mead as stating that the impact of the Corrugated Antitrust case has been exaggerated. It is respectfully suggested that Mead has also exaggerated in its presentation to your Committee the harm that will allegedly befall the corporation if the Contribution Statute is not enacted.

Also enclosed is an advertisement by Mead in the Wall Street Journal of June 2 noting its tremendous resources and indicating its complete confidence in its financial stability.

Respectfully yours,

Harold E. Kohn

HEK/jc

encl: as noted

Exhibit "E"

Mead Says Impact of Suit Is Exaggerated

By PHILLIP H. WIGGINS

The Mead Corporation said yesterday that the potential effect of the Supreme Court's recent announcement in the long-running corrugated-container antitrust case had been misrepresented in news reports.

The diversified forest products company contended that the amounts of possible damages cited came solely from "inflated and irresponsible speculative reports" that followed a civil trial in Houston last summer. Those reports have estimated Mead's liability between $350 million and $1 billion.

"We think we have zero liability, based on the Kouston verdict," said John A. Irvine, the company's assistant general counsel for litigation. "We have not increased our litigation reserves at all. They amounted to $3.3 million at the end of 1980 and $10 million at the end of 1979." The reserves were reduced by $6.7 million as a result of settlements in unrelated antitrust cases, Mr. Irvine said.

He estimated that it would be four to eight months before any judgment in the case was made, and he declared that Mead would immediately appeal the judgment if it was adverse to the company.

Last September a Federal District Court jury in Houston found that the company, based in Dayton, Ohio, was part of a conspiracy to fix prices. But Mead denies that the jury set guidelines for determining damages.

Others in Case Have Settled

The nearly 100 companies that brought the antitrust suit have already settled with the 34 other container makers involved in the case for more than $400 million, including interest. The case, which began in 1976, is one of the largest price-fixing lawsuits in history.

"I am confident that the ultimate liability, if any, will in no way approach the grossly inflated amounts carried in some news reports," said Gerald D. Rapp, a senior vice president and general counsel at Mead.

This week the Supreme Court declined to consider a petition by Mead to halt a special master's fact-finding proceedings, which are now under way at the court in Houston.

"Filing of the petition was a request for extraordinary relief in the case, and the Court's denial of the petition was in no way related to the merits of the case, nor does it represent a setback in Mead's pursuit of the case," Mr. Rapp asserted. "It would have been to Mead's advantage, however, if the pe tion had been heard because it wou have expedited what will otherwise a very lengthy legal proceeding."

Mr. Rapp said the Supreme Court a tion had no effect on Mead's futu rights of appeal, including an appeal the appointment of the special maste if damages are determined, or merits of such an appeal.

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MEMBERS
DISTRICT OF COLUMBIA BAR

September 17, 1981

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
209 Russell Building
Washington, D.C. 20510

Re: S-995

Dear Senator Thurmond:

We understand that Georgia Pacific and its associated defendants in the Plywood antitrust litigation are renewing the efforts to add a retroactivity provision to the pending Contribution Bill, S-995.

As trial counsel for the Plywood Plaintiffs and thousands of class members, I believe your Committee should be apprised of several significant facts, which indicate that the Georgia Pacific group's position is without merit.

(1) Georgia Pacific, Weyerhaeuser and Willamette, the three defendants against which judgment has been affirmed by a unanimous opinion of the United States Court of Appeals for the Fifth Circuit, have between 45% and 50% of the market. Approximately half the remainder of the market, or approximately 25% of the total, is shared by three other producers, Champion International, Louisiana Pacific ("spun off" from Georgia Pacific), and International Paper Company, all three of which settled with Plaintiffs well in advance of trial. These settling defendants and the Georgia Pacific group were parties to a so-called "sharing agreement" by which they undertook either to share in the payment of any judgment or to require Plaintiffs, in the event of a settlement, to reduce the judgment proportionately. When Plaintiffs settled with Champion, et al, we agreed to that reduction, so that the judgment now rendered against Georgia Pacific and the other two trial defendants has been reduced by one quarter, without the aid of any new legislation.

Plaintiffs also settled with approximately 25 other companies, most of them small producers, who together had about 25% of the market. These smaller companies were not parties to the sharing agreement and their production does continue as a basis for liability on the part of Georgia Pacific, Weyerhaeuser and Willamette.

Accordingly, no matter what legislation is passed, whether retroactive or not, Georgia Pacific, Weyerhaeuser and Willamette will have to pay at least half of the judgment and are not obliged to pay more than 75% of it.

We respectfully suggest that it would be inappropriate because of this relatively small proportionate reduction in the liability of these three companies to jeopardize and confuse the situation in literally hundreds of other pending cases by making contribution retroactive.

(2) Georgia Pacific, Weyerhaeuser and Willamette, all represented by the same counsel, stubbornly refused to make any settlement in any amount whatsoever, unlike nearly 30 other defendants. Interestingly enough, two of the settling defendants had also been represented by the same law firm, but shortly after obtaining other counsel entered into very modest settlements. The Georgia Pacific group were offered precisely the same opportunity. Indeed, "offered" is hardly the word; they were begged by Plaintiffs to settle. I personally visited the office of counsel in Chicago and was preemptorily dismissed without any offer being made on behalf of the defendants, despite my journey from Philadelphia. Counsel told me that they couldn't lose the case, were going to prove how soft other law firms were, and indicated their expectation that thereafter the firm would be representing all antitrust defendants of any consequence. Despite this rebuff, on June 15, 1978, I wrote counsel making a formal offer totalling $9 million, $5 million to be paid by Georgia Pacific and $2 million each by the other companies, this being generally proportionate to their production volume. The reply was that a Plaintiffs' verdict was highly unlikely and that obstacles with which I should be familiar convinced these defendants that Plaintiffs were "a long, long way from an enforceable final judgment". Nevertheless, I wrote again on June 28, 1978, urging settlement, but received no reply.

The case was tried in October - November, 1978, resulting in the verdict for Plaintiffs. Thereafter, Plaintiffs again pursued defendants seeking a modest settlement, and on December 14, 1978, I again wrote to counsel. No reply was received to my letter or subsequent telephone calls.

Plaintiffs respectfully suggest that it would be inappropriate for Congress now to reduce a judgment litigated over many years for the special benefit of three defendants who have shown such utter contempt for the opinions of their fellow defendants and have so recklessly incurred the liability, for the relief of which they now burden an already over-burdened Congress, after eight years of Court litigation.

(3) Ordinarily, we would hesitate to cite the financial status of a defendant as a relevant factor, but it is necessitated in this situation by the repeated assertions of the Georgia Pacific group to members of the Senate that the judgment (brought on themselves by their own obstinancy and arrogance) will bankrupt the Company.

They also sought to leave this impression with the Court of Appeals, which wasn't impressed thereby. Nor should the Senate be impressed, because it simply isn't so.

The same financial burden argument was expressly made by the three defendants to the Court of Appeals for the 5th Circuit, and the defendants had their opportunity to convince the Court on this issue. It is clear that the Court was not persuaded by this contention, and did not believe it to be relevant. Having failed to convince the Judges, the Georgia Pacific group is now beginning all over again with the Senators.

At most, as stated above, if the final judgment is $1.5 billion, the retroactive clause would reduce it by $375 million. Of this amount, approximately $175 million would be paid by Georgia Pacific, and $100 million by each of the other corporations.

We quote a brief portion of a pleading filed with the Court of Appeals, which alludes to this subject:

> "... what may be 'large' for one company to bear may be easily taken in stride by another with enormous cash flow and assets, such as these defendants. The ability of Georgia-Pacific and Weyerhaeuser to pay such a judgment without undue strain is unquestioned. The 1978 Financial Statements of these two appellants show they generated more than $1.5 billion in funds from

operations in that one year,* without taking into consideration any of the tremendous unrealized daily appreciation in value of their more than 11 million acres of forest lands, which also contain mineral resources.**

" *See Income Statements Year Ending 1978 (Georgia-Pacific Annual Report 1979 p. 31; Weyerhaeuser Annual Report 1978 p. 33).

"**E.g., Georgia-Pacific states in its Annual Report for 1979 at page 19:

> 'At year-end, Georgia-Pacific net proved reserves totaled 127 billion cubic feet of natural gas and 6.1 million barrels of oil condensate.
>
> 'Other G-P resources include more than 130 million tons of gypsum; a 200-year supply of salt for use as raw material for chlorine, caustic soda and sodium chlorate; and the mineral rights on most of its fee-owned lands, including the rights to an estimated 242 million tons of metallurgical coal.' "

(4) Notwithstanding all of the foregoing, Plaintiffs stand ready to discuss settlement with Georgia Pacific, Weyerhaeuser and Willamette, or any of them, on a reasonable basis.

It should also be noted that the issue of retroactivity has never been aired at a public hearing. We shall be happy to appear at any such hearing to present our position and to respond to the contention of those who propose retroactivity.

We shall be happy to discuss these or any other related matters with you or other Senators or your staff, at your convenience.

Very truly yours,

Harold E. Kohn

HEK:hof

cc: All members of the Senate Committee

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MEMBERS
DISTRICT OF COLUMBIA BAR

November 5, 1981

Honorable Peter W. Rodino, Jr.
Chairman, House Judiciary Committee
2462 Rayburn Office Building
Washington, D.C. 20515

Dear Congressman Rodino:

The "Antitrust & Trade Regulation Report", No. 1037, October 29, 1981, reports at pages A-10 and G-1 that Assistant Attorney General William F. Baxter has sert to you a proposed draft Contribution statute as a suggested alternative for H.R. 1242 and 4072.

As a lawyer who has practiced actively in the field of antitrust litigation for many years, during the course of which I have testified and made presentations to your Committee and to the Senate Judiciary Committee on this and other proposed antitrust legislation, I want to register my objection to the new Baxter draft Contribution statute.

It is subject to the same defects which have previously been called to the attention of your Committee, and, in addition, others.

The reference to the "relative responsibility of each party" in non-price fixing cases improperly limits the factors to be considered if there is to be an equitable contribution rule.

The provision in subparagraph (e) appears to be inconsistent with subparagraph (h), because (e) does affect the joint and several liability of Defendants.

The provision for the elimination of jury trials is inevitably bound to lead to litigation all the way to the Supreme Court, which will require years to resolve.

For these reasons and the reasons previously advanced by opponents of the legislation, we strongly urge that Contribution legislation be tabled, so that Congress can be relieved of this unnecessary burden at a time when it has so many real problems claiming its attention.

In the event that there is any further consideration of a Contribution statute, we respectfully request the opportunity to appear at a hearing and to present a further, more detailed written comment on whatever specific legislation is then being considered.

Very truly yours,

Harold E. Kohn

HEK:hof

NEWS & COMMENT

ANTITRUST DIVISION CHIEF DEFENDS EXPANSION OF CONTRIBUTION BILL, MODIFIES HIS PROPOSAL

Assistant Attorney General William F. Baxter this week explained his expanded contribution bill at a Senate Judiciary Committee hearing and offered some minor refinements to his own bill. [Text of draft bill and analysis appears at page F-1.]

Baxter's proposal incorporates many of the basic provisions of S. 995, which would permit the apportionment of liability among antitrust defendants and would eliminate the possibility that a nonsettling defendant could be exposed to liability for the entire overcharge less any settlement amounts. The crucial difference is that Baxter's bill would extend the right of contribution to all antitrust violations, not just price fixing.

Most other witnesses appearing at the Dec. 7 hearing generally approved of the Baxter approach, but several suggested that only one standard, that of "relative responsibility," be used by the courts in making contribution determinations.

Fairness

Baxter claimed that "a stronger argument could be made on fairness grounds for permitting contribution among defendants in rule of reason cases than for doing so in cases involving classic cartel-type violations such as horizontal price fixing." In an effort to provide for maximum procedural flexibility, Baxter's bill allows contribution claims to be raised by way of cross-claim, counterclaim, or third-party claim or in a separate action for contribution. In addition, his bill makes clear that it is unnecessary for there to have been a prior action for, or adjudication of, joint liability for antitrust damages against a person before a claim for contribution may be asserted against a person. Such liability may be determined in a separate action for contribution.

"The determination of whether there is joint liability for antitrust damages should turn on the careful application of antitrust theory to the particular facts of each case and should not be affected by the availability of contribution," Baxter testified.

Baxter's bill limits the time during which actions for contribution can be brought. His bill provides "a six-month limit after entry of final judgment in the underlying antitrust action-in-chief for filing claims for contribution."

Claims for contribution against persons who have entered into good faith settlements with antitrust claimants would be prohibited. Contribution, Baxter maintained, "should not discourage reasonable settlements." He added: "If those who wished to settle on fair terms with an antitrust plaintiff would face claims for contribution and potentially binding determinations of liability in contribution litigations, they would probably decline to settle on any terms, regardless of the good faith of all involved." His bill also would prohibit claims for contribution by persons entering into any settlement.

Altered in a second version of his bill presented to the Committee this week was a provision that would have required settling persons to provide notice to the court and other persons. Instead, Baxter suggested, "[p]arties in antitrust actions have the ability, through pretrial discovery and at trial, to determine the existence of settlements entered into by the plaintiff that could affect their claim reduction and contribution rights, and * * * the burden of uncovering this information could appropriately rest with them."

Justice's claim reduction provision, identical to that of S. 995, would provide that a plaintiff entering into a partial settlement will have that claim reduced by the greatest of (1) any amount stipulated for this purpose, (2) the amount of the consideration paid for the settlement, (3) or the settling person's contribution share. -

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0003-6021/81/$00.50

Exhibit "H"

Contribution and claim reduction rights would be determined after the conclusion of the case-in-chief, which, Baxter said, "should minimize interference with the underlying antitrust action."

For claims limited to price fixing, contribution claims would determined on the basis of relative magnitudes of sales or purchases of the price-fixed goods. With respect to other types of violations, Baxter's approach is designed to give judges flexibility by having contribution shares be determined according to "relative responsibility." The head of the Antitrust Division said he and his staff were unable to come up with any more objective criterion.

Baxter's bill would provide for trial by court,,not jury, of contribution issues. But, in a slight addition to the original bill, Baxter has added a severability clause to protect the legislation in the event the judiciary determines that a jury trial is constitutionally required.

Commenting on the effect of the legislation, Baxter predicted that it would be harder to settle antitrust cases, especially through "whipsaw settlement techniques." He also could foresee that fewer spurious antitrust cases will be brought. The overall effect, he said, will be a reduced load on the courts.

No Lessened Deterrence

Charles B. Renfrew, of San Francisco, supported contribution as "a clear unmistakable trend in the law." Even wrongdoers are entitled to fairness, he claimed. "Most antitrust violations are not the result of intentional acts."

Renfrew, formerly a federal district judge and deputy attorney general, denied that contribution would lessen the deterrent effect of the antitrust laws. He noted the continued significance of criminal sanctions and treble damage liability. Renfrew also disputed the assertion that contibution add to complexity in antitrust trials.

Although the hearing was not focused on the controversial question of making the contribution bill applicable to pending cases, Renfrew presented preliminary results of a study indicating that as many as 2,500 companies involved in 1,654 antitrust cases could be affected by the decision.

Representing the American Bar Association's Section of Antitrust Law, Robert Taylor, of San Francisco, noted several differences between Baxter's bill and the ABA's position.

In particular, he supported the "relative responsibility" standard for all cases. Any attempt to make a distinction invites parties to posture in their filings, he said. Taylor also said contribution claims should be filed more promptly than proposed by Baxter.

Undue Complication

Professor Frank H. Easterbrook, of the University of Chicago, argued that contribution "will increase the costs of antitrust litigation and reduce, to an unknown degree, the utility of the antitrust law in deterring wrongdoers."

Opposing the contention that fairness demands contribution, Easterbrook stressed that "antitrust offenses are crimes, and intentional crimes at that." He added: "Fairness is equal treatment given the odds, and the right time to measure 'equality' is before the game is played." Easterbrook also noted that settlement saves the cost of trials and thus enhances the cost-effectiveness of the antitrust laws. Contribution would complicate litigation and increase the costs of litigation, he contended.

"The costs would purchase no visible benefits, save the elimination of the additional payements attributable to the settlement whipsaw effect." Easterbrook concluded: "And even this elimination is of doubtful benefit; if antitrust penalties for concealable offenses are too low, as I believe, contribution and claim reduction would reduce the effectiveness of the antitrust laws ever further."

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JUSTICE DEPARTMENT'S PROPOSAL ON CONTRIBUTION AND SECTION-BY-SECTION ANALYSIS OF PROPOSAL

Draft Contribution Amendment

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Any person who is liable for damages in an action brought under section 4, 4A, or 4C of this Act may claim contribution, in accordance with this section, from any other person jointly liable for such damages.

"(b) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

"(c) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

"(d) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

"(e) In any action under section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of: (1) any amount stipulated for this purpose, (2) the amount of the consideration paid for the release, or (3) the contribution share of the person released.

"(f) Contribution and claim reduction rights shall, to the extent consistent with the fair and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which contribution or claim reduction rights are claimed. With respect to claims based upon price fixing among competitors, contribution shares shall be determined on the basis of the relative magnitude in the affected market of each such competitor's sales or purchases of goods or services subject to the violation. In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each party for the origination or perpetration of the violation for which damages have been awarded and the benefits derived therefrom.

"(g) Unless inconsistent with the just and expeditious conduct of litigation, contribution and claim reduction rights shall be determined by the court sitting without a jury.

"(h) Nothing in this section shall affect the joint and several liability of any person.

"(i) [Applicability provision, if any.]"

Draft Contribution Amendment
Section-by-Section Analysis

(a) Subsection (a) provides that there shall be rights of contribution among persons jointly liable for damages arising under the antitrust laws. This reverses the decision of the Supreme Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981), denying contribution in antitrust damage actions.

(b) Subsection (b) provides that contribution claims may be raised in the antitrust action-in-chief or in a separate action for contribution. Within the action-in-chief, claims for contribution may be raised by way of cross-claim, counterclaim, or third-party claim. This is intended to give the parties procedural flexibility in raising contribution issues. Contribution claims by defendants against nonparties to the underlying antitrust action also may be raised in a separate action for contribution. There is no intention to affect in any way the underlying substantive law concerning liability for antitrust damages. The subsection also provides that it is not necessary that there be a prior action for, or adjudication of, joint liability for antitrust damages against a person before a claim for contribution may be asserted against that person. Such liability may be determined in the action for contribution.

(c) Subsection (c) provides a six-month statute of limitations for contribution claims, measured from the date on which the antitrust judgment for which contribution is sought becomes final. This will provide ample time for those persons jointly liable for damages by reason of such judgment to file separate actions for contribution, and at the same time assure that all contribution claims will be filed expeditiously.

(d) Subsection (d) provides that persons who have entered into good faith settlements with the plaintiff may neither sue nor be sued for contribution. Prohibiting claims for contribution against settled persons will encourage settlements by guaranteeing that persons receiving settlements will be able to avoid binding determinations of liability and additional claims for damages once they have entered into a good faith settlement. Prohibiting suits for contribution by settled persons recognizes that settlement is a voluntary act, the consequences of which should affect none but the settling parties. A person who enters into an unwise settlement should not be able to shift the burden of that settlement to others, and this subsection therefore denies persons who settle the right to seek contribution based on such settlements.

(e) Subsection (e) provides for claim reduction in antitrust damage actions brought pursuant to Clayton Act Section 4, 4A, or 4C. When a plaintiff settles with a defendant in an antitrust action under current law, only the amount of the settlement is deducted from the plaintiff's claims against remaining defendants to avoid double recoveries. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). This would be changed to provide that a settlement reduces the plaintiff's remaining claims by the greatest of any amount stipulated for this purpose, the amount of the settlement, or the settling person's contribution share. This will insure that nonsettling defendants are not made worse off by reason of favorable settlement terms negotiated between the plaintiff and settling persons.

(f) Subsection (f) provides that contribution and claim reduction rights are to be decided after the conclusion of the antitrust case-in-chief, to the extent consistent with the fair and expeditious conduct of litigation. Some contribution issues, such as liability in cross-claim and counterclaim contexts, and perhaps in some unusual instances of third-party claims as well, might be expeditiously resolved in the case-in-chief, but in general, determining contribution and claim reduction rights afterwards should minimize interference with the underlying antitrust action.

This subsection also provides the method to be used in calculating contribution shares. Regarding claims limited to price fixing among competitors, contribution shares are to be calculated on the basis of the relative magnitude of sales or purchases of the price-fixed goods or services in the market affected by the violation. Regarding all other claims, the court shall consider the relative responsibility of the parties for originating or carrying out the violation as well as the parties' relative benefits from the violation.

(g) Subsection (g) provides that contribution and claim reduction rights are to be determined by the court rather than by a jury unless inconsistent with the just and expeditious conduct of litigation. Contribution is an equitable doctrine, and the complex issues required to be determined to afford contribution and claim reduction are best left to the court whenever justice permits. It is also believed that subsection (g) will minimize the judicial resources and time needed to settle contribution and claim reduction claims.

(h) Subsection (h) is intended to make clear that this section does not alter the traditional rule that antitrust violators are jointly and severally liable for the damages caused by their violations.

(i) Subsection (i) would contain an applicability clause if Congress decides that one is desirable. The Department takes no position on the desirability of including an applicability clause or on its specifics if one is included.

— End of Section F —

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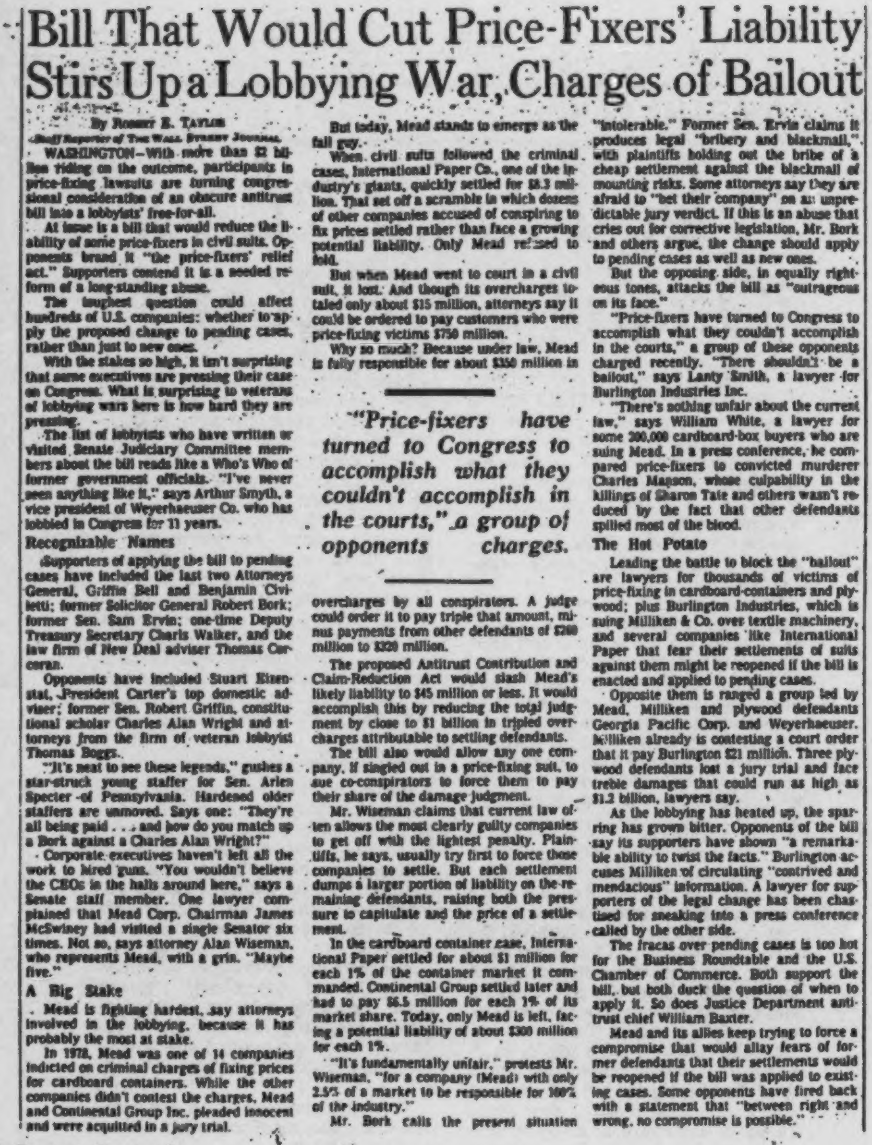

Bill That Would Cut Price-Fixers' Liability Stirs Up a Lobbying War, Charges of Bailout

By Robert E. Taylor

Staff Reporter of The Wall Street Journal

WASHINGTON—With more than $2 billion riding on the outcome, participants in price-fixing lawsuits are turning congressional consideration of an obscure antitrust bill into a lobbyists' free-for-all.

At issue is a bill that would reduce the liability of some price-fixers in civil suits. Opponents brand it "the price-fixers' relief act." Supporters contend it is a needed reform of a long-standing abuse.

The toughest question could affect hundreds of U.S. companies: whether to apply the proposed change to pending cases, rather than just to new ones.

With the stakes so high, it isn't surprising that some executives are pressing their case on Congress. What is surprising to veterans of lobbying wars here is how hard they are pressing.

The list of lobbyists who have written or visited Senate Judiciary Committee members about the bill reads like a Who's Who of former government officials. "I've never seen anything like it," says Arthur Smyth, a vice president of Weyerhaeuser Co. who has lobbied in Congress for 11 years.

Recognizable Names

Supporters of applying the bill to pending cases have included the last two Attorneys General, Griffin Bell and Benjamin Civiletti; former Solicitor General Robert Bork; former Sen. Sam Ervin; one-time Deputy Treasury Secretary Charls Walker, and the law firm of New Deal adviser Thomas Corcoran.

Opponents have included Stuart Eizenstat, President Carter's top domestic adviser; former Sen. Robert Griffin, constitutional scholar Charles Alan Wright and attorneys from the firm of veteran lobbyist Thomas Boggs.

"It's neat to see these legends," gushes a star-struck young staffer for Sen. Arlen Specter of Pennsylvania. Hardened older staffers are unmoved. Says one: "They're all being paid . . . and how do you match up a Bork against a Charles Alan Wright?"

Corporate executives haven't left all the work to hired guns. "You wouldn't believe the CEOs in the halls around here," says a Senate staff member. One lawyer complained that Mead Corp. Chairman James McSwiney had visited a single Senator six times. Not so, says attorney Alan Wiseman, who represents Mead, with a grin. "Maybe five."

A Big Stake

Mead is fighting hardest, say attorneys involved in the lobbying, because it has probably the most at stake.

In 1978, Mead was one of 14 companies indicted on criminal charges of fixing prices for cardboard containers. While the other companies didn't contest the charges, Mead and Continental Group Inc. pleaded innocent and were acquitted in a jury trial.

But today, Mead stands to emerge as the fall guy.

When civil suits followed the criminal cases, International Paper Co., one of the industry's giants, quickly settled for $8.3 million. That set off a scramble in which dozens of other companies accused of conspiring to fix prices settled rather than face a growing potential liability. Only Mead refused to fold.

But when Mead went to court in a civil suit, it lost. And though its overcharges totaled only about $15 million, attorneys say it could be ordered to pay customers who were price-fixing victims $750 million.

Why so much? Because under law, Mead is fully responsible for about $350 million in overcharges by all conspirators. A judge could order it to pay triple that amount, minus payments from other defendants of $280 million to $320 million.

"Price-fixers have turned to Congress to accomplish what they couldn't accomplish in the courts," a group of opponents charges.

The proposed Antitrust Contribution and Claim-Reduction Act would slash Mead's likely liability to $45 million or less. It would accomplish this by reducing the total judgment by close to $1 billion in tripled overcharges attributable to settling defendants.

The bill also would allow any one company, if singled out in a price-fixing suit, to sue co-conspirators to force them to pay their share of the damage judgment.

Mr. Wiseman claims that current law often allows the most clearly guilty companies to get off with the lightest penalty. Plaintiffs, he says, usually try first to force those companies to settle. But each settlement dumps a larger portion of liability on the remaining defendants, raising both the pressure to capitulate and the price of a settlement.

In the cardboard container case, International Paper settled for about $1 million for each 1% of the container market it commanded. Continental Group settled later and had to pay $6.5 million for each 1% of its market share. Today, only Mead is left, facing a potential liability of about $300 million for each 1%.

"It's fundamentally unfair," protests Mr. Wiseman, "for a company (Mead) with only 2.5% of a market to be responsible for 100% of the industry."

Mr. Bork calls the present situation "intolerable." Former Sen. Ervin claims it produces legal "bribery and blackmail," with plaintiffs holding out the bribe of a cheap settlement against the blackmail of mounting risks. Some attorneys say they are afraid to "bet their company" on an unpredictable jury verdict. If this is an abuse that cries out for corrective legislation, Mr. Bork and others argue, the change should apply to pending cases as well as new ones.

But the opposing side, in equally righteous tones, attacks the bill as "outrageous on its face."

"Price-fixers have turned to Congress to accomplish what they couldn't accomplish in the courts," a group of these opponents charged recently. "There shouldn't be a bailout," says Lanty Smith, a lawyer for Burlington Industries Inc.

"There's nothing unfair about the current law," says William White, a lawyer for some 200,000 cardboard-box buyers who are suing Mead. In a press conference, he compared price-fixers to convicted murderer Charles Manson, whose culpability in the killings of Sharon Tate and others wasn't reduced by the fact that other defendants spilled most of the blood.

The Hot Potato

Leading the battle to block the "bailout" are lawyers for thousands of victims of price-fixing in cardboard-containers and plywood; plus Burlington Industries, which is suing Milliken & Co. over textile machinery, and several companies like International Paper that fear their settlements of suits against them might be reopened if the bill is enacted and applied to pending cases.

Opposite them is ranged a group led by Mead, Milliken and plywood defendants Georgia Pacific Corp. and Weyerhaeuser. Milliken already is contesting a court order that it pay Burlington $21 million. Three plywood defendants lost a jury trial and face treble damages that could run as high as $1.2 billion, lawyers say.

As the lobbying has heated up, the sparring has grown bitter. Opponents of the bill say its supporters have shown "a remarkable ability to twist the facts." Burlington accuses Milliken of circulating "contrived and mendacious" information. A lawyer for supporters of the legal change has been chastised for sneaking into a press conference called by the other side.

The fracas over pending cases is too hot for the Business Roundtable and the U.S. Chamber of Commerce. Both support the bill, but both duck the question of when to apply it. So does Justice Department antitrust chief William Baxter.

Mead and its allies keep trying to force a compromise that would allay fears of former defendants that their settlements would be reopened if the bill was applied to existing cases. Some opponents have fired back with a statement that "between right and wrong, no compromise is possible."

Wall Street Journal
October 14, 1981 (page 31)

Exhibit "J-1"

D4 THE NEW YORK TIMES
FRIDAY, OCTOBER 16, 1981

COMPANY NEWS

Price-Fixing Rules: Timing Is the Key

By ROBERT D. HERSHEY Jr.

Special to The New York Times

WASHINGTON, Oct. 15 — It's just a one-sentence provision stuck on the end of Senate bill No. 995, a relatively obscure and broadly supported measure that would change the way damages are assessed in corporate price-fixing cases.

"This section," it reads, "shall apply only to actions under section 4, 4A or 4C of this act commenced after the date of enactment of this section."

These 25 words have touched off one of the fiercest battles that many Congressional staff members can remember, a billion-dollar struggle that has summoned the best from the nation's legal pantheon and thrown them into an extraordinary lobbying effort.

Question of Timing

In essence, the battle is over whether new methods of assessing penalties for price fixing should apply to cases not yet completely settled.

If pending cases are excluded, the Mead Corporation and four other companies that lost price-fixing decisions will probably be able to avoid paying hundreds of millions of dollars in damages.

On the other side are 200,000 businesses that bought corrugated boxes or plywood from the price fixers and who are seeking damage payments. These "victims" are joined by various concerns, led by the International Paper Company, that settled out of court for relatively small amounts and that fear their cases may be reopened and their liabilities increased.

A House committee, where the price-fixing victims are almost certain winners, is to start hearings on a bill next Wednesday. But in the Senate, where the outcome is regarded as a tossup, there has been yet another in a series of delays, and the Judiciary Committee now expects not to take up the issue until sometime next month.

The drama takes place all across the capital.

Three lawyers star in a klieg-lighted news conference, other high-priced practitioners pace nervously in Capitol Hill anterooms and one lawyer pointedly suggests that his principal opponent stands personally to rake in $15 million from the proceedings.

"No other issue has been so heavily lawyered," says one weary Senate aide. "It seems some days that two or three guys have been hired for each Senator. It's just been unbelievable."

The contest has already engaged at least two former Cabinet members, a former Solicitor General who is said to be in line for the Supreme Court, three former Senators and several of the city's premier trouble-shooting lobbyists.

Carter Aides as Lobbyists

It even pits two pairs of top Carter Administration officials against each other — Griffin B. Bell and Benjamin R. Civiletti, both of whom served as Attorney General, versus Stuart E. Eizenstat, senior domestic policy adviser, and Richard Moe, chief of staff for former Vice President Walter F. Mondale.

The lobbying effort has produced mountains of documents: "Every time somebody submits a 20-page paper, somebody else submits a 20-page paper," complained one Senate staff member, who now has a 16-inch pile.

There has also been an almost overwhelming number of requests for face-to-face meetings.

Among the somewhat unusual tools of persuasion used has been a "seminar" for House staff members arranged by Representative Billy Lee Evans, a Georgia Democrat who is a sponsor of the legislation.

At this session Mead and its allies weighed in with Mr. Bell, former Solicitor General Robert H. Bork and former Senator Birch Bayh. "When you start using those names, they start making inroads," a somewhat worried opponent of the provision observed.

Mr. Bayh, of course, has been talking with liberal Democrats and others

Exhibit J-2"

THE NEW YORK TIMES, FRIDAY, OCTOBER 16, 1981

Clockwise from top left are Benjamin R. Civiletti, Birch Bayh, Robert H. Bork, and Griffin B. Bell.

with whom he once served, and Robert P. Griffin, a former Senator from Michigan, is said to have buttonholed fellow Republicans, including Senator Orrin G. Hatch of Utah, in behalf of International Paper.

Mead also briefed a group of its plant managers and set them loose on Representatives and Senators from areas where its plants are situated. Mr. Civiletti is said to have talked about the issue in Mead's behalf with Representative Peter W. Rodino Jr., the New Jersey Democrat who heads the House Judiciary Committee.

But Irving S. Shapiro, former chairman of the Du Pont Company, has dropped out. Early in the campaign, he represented Mead, but then Burlington Industries, a major Du Pont customer and a Mead opponent on this issue, let it be known that Mr. Shapiro's activity was unwelcome.

The main argument of Mead and the others found guilty of antitrust violations is that unless the exclusion applies to them, they, in effect, will suffer out of all proportion to their guilt. In fact, they say, it would be particularly unjust to exclude them from the protection of the new law since it was their own cases that exposed the deficiencies of the current law. The other side insists that Mead and its allies, having lost their cases, are now seeking a "bailout" by Congress.

Whatever the outcome, the issue has been eating up huge chunks of the legislators' time. Once, when consideration was delayed, a Senator was heard to complain: "You mean we've got to have three more weeks of lobbying on this thing?"

Washington Post

Friday, October 0

Rowland Evans

And Robert Novak

Lobbyists' Super Bowl

A prospective Supreme Court justice urging senators to support congressional bailout of corporations convicted by the courts as antitrust violators is part of the fiercest lobbying battle being waged in backstage Washington, invisible to the outside world.

Former solicitor general Robert Bork, presumed to be President Reagan's future Supreme Court choice, has buttonholed senators and their aides to help his clients out of trouble. He is not alone. Just about every high-priced lawyer and lobbyist in town is battling over billions of dollars in price-fixing damages.

Members of the Senate Judiciary Committee are being bombarded by merciless lobbying pressure to make past malefactors eligible on a retroactive basis for a proposed new method of setting antitrust damages.

This is the lobbyists' Super Bowl. Former attorneys-general, senators and White House aides, plus cadres of the capital's super-lobbyists, are involved. There are two kinds of Washington lawyers today: those getting rich on this legislation and those who wish they were. With more big names retained with each passing hour, nobody can count the millions in fees.

Senators are swamped by telephone calls from chief executive officers back home and Washington representatives who in the past funneled campaign contributions from political action committees of the corporations now seeking relief. This is the Washington jungle, unregulated by an administration that refuses to take sides.

The key company in the case is the Mead Corp., a Dayton, Ohio, paper products firm found guilty of price-fixing and facing a possible $750 million in treble damages. Mead is joined by three plywood manufacturers—Georgia-Pacific, Weyerhaeuser and Willamette Industries—found guilty of price-fixing to the tune of $1.5 billion in damages. The fifth firm is Milliken & Co., the textile manufacturer which lost a $21 million antitrust treble damage award to Burlington Industries.

All five companies are pushing for a retroactive amendment to a Senate bill that would ease the liability for damages by future price-fixers. Since the retroactive amendment amounts to a congressional bailout for companies that refused to settle out of court and instead lost in litigation, it was given little or no chance.

That was before the unprecedented all-star talent appeared on the scene. The respected Griffin Bell, former attorney general and a federal appeals court judge before that, emerged as a lobbyist for Georgia-Pacific. So did former senator Birch Bayh. Super-lobbyist Charls E. Walker, a master Capitol Hill string-puller, entered the battle in Mead and Weyerhaeuser colors. Thomas (Tommy the Cork) Corcoran, the veteran wheeler-dealer, is handling Milliken. Mead recruited ex-Du Pont chief Irving Shapiro.

But Bob Bork, renowned conservative theoretician and constitutional scholar, was the most decisive combatant as counsel for Georgia-Pacific and Milliken. Arguing his case in letters and telephone calls to senators and at meetings of business groups, he turned a hopeless cause into a possibility. When the administration let it be known that Bork will be nominated to the U.S. Court of Appeals for the District of Columbia, he eased up on his lobbying. But his work had been done.

Plaintiffs and those defendants who settled out of court had been assured by their Washington offices that Congress never would enact a bailout. But the lobbyists for the five companies have succeeded in repeatedly postponing Senate Judiciary Committee action on the bill while they gathered supporters for their amendment.

Alarmed, the anti-amendment companies found their own all-stars. Super-lobbyist Tommy Boggs was retained by Burlington. International Paper Co., which had settled in the paper case along with 33 other companies while only Mead insisted on going to trial, hired former senator Robert Griffin. The other side counterattacked with more big names. Benjamin Civiletti, Bell's successor as attorney general, has scheduled meetings with a key Judiciary Committee member to discuss the bill in behalf of an unnamed client.

The notion of a congressional bailout for a company which has been assessed severe antitrust damages in court is considered so outlandish that William Baxter, assistant attorney general for antitrust, is presumed to be opposed. But he refused to talk to us, referring us to the Justice Department press office, which stated the government's position: "Neutral."

Lawyers and lobbyists delighted with the rich harvest of fees confront senators who consider the unbearable pressure a bad dream. So these senators search for a compromise that would relieve the companies of part of their court-imposed damages for violating the nation's price-fixing laws. That is how Washington works when the super-lobbyists roll into action.

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Exhibit "J-3"

According to the complaint, Sugarman's firm was tardy with at least 22,000 out of 50,000 shipments between August 1977 and December 1978. The agency also claimed JS&A failed to make prompt refunds and did not provide customers with a way of notifying the firm of their desire to cancel delayed orders. JS&A sells microelectronic products, such as calculators and digital clocks.

Under the mail order trade regulation rule, a company must ship merchandise within 30 days after an order accompanied by a check is recieved or within the time stated in advertisements. If the company cannot meet the deadline, the buyer must be offered an alternative delivery date or a refund. JS&A allegedly solicited orders for certain products when it had no reasonable basis to expect that it could ship merchandise within the required time. For each violation, JS&A could be subject to a $10,000 civil penalty; however, the complaint gives no indication of what penalty the government will seek.

The House Commerce Investigation Subcommittee, chaired by Rep. John Dingell (D-Mich), had scheduled a September 18 hearing to air differences between Sugarman and from FTC officials.

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BUSINESS GROUPS RECONSIDER POSITIONS ON CONTRIBUTION BILL

After an unusual, formally-staged debate, the Chamber of Commerce's Counsel on Antitrust Policy has declared itself "neutral" on a controversal amendment to the contribution bill (S. 995).

The debate at Chamber headquarters in Washington pitted corporate interest versus corporate interest on the issue whether the contribution measure should be applied to pending price fixing cases. The contribution bill would apportion liability among antitrust defendants and is scheduled for a September 15 vote in the Senate Judiciary Committee, where it is expected to pass overwhelmingly.

The dispute has been fueled by Mead Corporation and about 100 corporate sympathizers, which argue that, if the contribution principle is suitable for future cases, it is appropriate to apply it to pending cases. Opponents of the "pending" amendment, such as International Paper, argue that existing settlements could be upset by the amendment.

August lobbying has been heavy on the amendment, according to Senate staffers, but Judiciary Committee members have been reluctant to get involved. One Republican staff member stated: "Here you have an industry-wide dispute, and I don't think any elected officials likes to jump into one like that."

A lawyer for Mead claims one senator is committed to introduce the Mead amendment but refuses to identify the senator. Senate staffers for members form both parties are skeptical of Mead's claim. "There are no secrets up here and, if they had somebody, it would have surfaced," one staffer commented. Sen. Paul Laxalt (R-Nev) helped Mead on July 21 by asking for a postponement of action on the contribution bill, but a Laxalt aide said the senator has taken no position on the Mead amendment.

In the meantime, lobbyists on both sides of the issue have been making the rounds on Capitol Hill and have been appealing for help from major business groups. Both the Business Roundtable and the National Association of Manufacturers are reconsidering their positions on the issue. Until now, both groups have expressed only support for the bill as introduced.

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Exhibit "K"

The Chamber of Commerce is still mid-process in its reconsideration of the "pending" issue, but Mead won a small victory recently when the Chamber's antitrust council voted to be "neutral" rather than "tepidly opposed," according to a Chamber official. To date, the Chamber has voiced support only for the contribution bill, implying doubts about the "pending" amendment. The council's position must be approved by other levels of the Chamber before it becomes official Chamber policy.

To help its antitrust council decide, the Chamber hosted a debate. Speaking for Mead's position were former Attorney General Griffin B. Bell, former Solicitor General Robert Bork, and Alan Wiseman. Speaking against the amendment were Stephen Susman, Ira Millstein, and Henry King.

During the meeting, Susman, plaintiffs' counsel in the corrugated container antitrust litigation, said the plaintiffs would settle with Mead for $75 million. Susman said he revealed his position to counter accusations that the plaintiffs are being extortionists. He noted that, just before the case went to the jury, the plaintiffs offered a $36.5 million settlement. According to Susman, Mead refuses to discuss a settlement above that figure.

Mead is the last remaining defendant in the case, and a jury in September 1980 awarded plaintiffs nearly $400 million in damages. That award is being reviewed by a special master. With previous settlements subtracted, Mead estimates its potential liability at about $750 million. Mead lobbyists point to their situation as "a laboratory case" of the need for contribution, claiming that Mead's alleged part in the antitrust violations was probably on the scale of 2.5% of the market. Officials from both sides say settlement negotiations have been sporadic but now are ceased.

In documents sent to senators, Meade argues: "The proposed legislation should apply to pending cases to ameliorate the gross injustice that would result from saddling one defendant, having a relatively small market share, with damages attributable to sales in an entire industry." Referring to itself, Mead claims: "This injustice is particularly acute in one pending case where a defendant that was acquitted in the proceding criminal case may become liable for the damages attributable to the entire industry, including the much larger sales of settling defendants that had pleaded nolo contendere in the criminal action."

Mead also argues that the amendment it proposes is intended to protect the rights of litigants that have settled. Both rights of contribution and claim reduction would be permitted under S. 995, but, according to Mead, its amendment is intended to ensure the finality of settlements.

One alternative recently added to the contribution debate was an amendment prepared by Washington attorney Philip Lacovara for the Business Roundtable. The Lacovara amendment would permit claim reduction in pending cases, provided that there was no "manifest injustice" in the reduction. The amendment also seeks to preserve existing settlements. The Business Roundtable is in the process of considering its current stand, which is for S. 995 as introduced.

In a recent letter to the Business Roundtable, Judiciary Committee Chairman Strom Thurmond (R-SC) reconfirmed his position in favor of the bill as introduced. A Thurmond aide said that no special significance should be attached to the letter and that Thurmond was simply trying to avoid confusion on his position.

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STATEMENT OF STEPHEN D. SUSMAN ON BEHALF OF CLASS REPRESENTATIVES IN THE CORRUGATED CONTAINER ANTITRUST CASE CONCERNING THE SUGGESTION THAT SENATE BILL 995 BE MADE APPLICABLE TO PENDING CASES

This statement is made on behalf of the some 200,000 American businesses—large and small—that purchased corrugated containers and sheets at illegally fixed prices from thirty-seven of the major corrugated manufacturers. Under current law, these businesses will be entitled to share in settlements with thirty-six of the manufacturers totalling $321 million and in the fruits of a favorable jury verdict against The Mead Corporation that is anticipated to result in a judgment for about $700 million. If that judgment were ultimately collected, the 200,000 plaintiff businesses would receive about 40% of the damages suffered by them by virtue of a price-fixing conspiracy the jury found to have gone on from at least 1964 through 1975.

These 200,000 businesses—the class plaintiffs in Corrugated—had an opportunity to opt out of the litigation, if they thought that the current law regarding contribution and claims reduction was unfair; if they thought that somehow by remaining in the litigation, they would arm the class representatives with the power of blackmail and destruction; if they did not want to use current law, for the benefit of their companies and stockholders, to recoup as much as possible from those who had gouged them for twelve years. And even today, if they think a judgment against Mead for over $700 million is unfair and do not wish to participate in it, they can still decline to do so.

The class representatives are appalled at the suggestion that Senate Bill 995 should be made retroactive to pending cases such as Corrugated where settlements have been entered and a complex lawsuit tried and won in reliance on existing law that makes the nonsettling defendants liable for the damages attributable to the sales of all co-conspirators. This would be grossly unfair to the class for it would at worst jeopardize their $321 million in settlements (plus interest thereon in excess of $100 million) and at best delay the distribution thereof for as much as a decade. It would also reduce the settlement value of the class' verdict against Mead by over 90% and largely render wasted the expenditure of millions of dollars of the class' resources to litigate against Mead for two and one-half years to obtain that verdict. It would also be unfair to settling defendants and to the public. Most importantly, it is not unfair to Mead to leave it where it finds itself today. A brief history of this case will clarify where that is.

In June 1978, one unindicted defendant, St. Regis, settled for $1.7 million before class certification.

In July, at a breakfast plaintiffs' counsel, Marc Seltzer of Los Angeles and Stephen Susman of Houston, attended with Mead's counsel, Harold Baker, of Washington, at the Whitehall Hotel in Houston, Texas, the class offered to settle with Mead for a million dollars per point, or for $3.2 million. Mr. Baker laughed and responded that a settlement with Mead of around $1 to $1.5 million in total might be more in line, but that he wasn't even sure he could recommend that Mead pay that much.

In August 1978, International Paper did not laugh when the same offer was made to them. They settled for a million dollars a point or $8.3 million. A month later, the class was certified.

In December, Mead stated through an attorney in open court in Houston, that it would not settle with the class, ever, for as much as $2 million per point or $6.4 million.

In January 1979, twenty other defendants settled for an additional $288 million. The $298 million in settlements up to that time were deposited in banks and have earned interest at the rate of 15% per annum in 1979 and 1980 and 20% during 1981. Some settling defendants paid as much as $6 to $6.5 million per point. During the Fall of 1978 and the Spring of 1979, Mead declined to settle at various levels between $6.4 million (or $2 million a point) and $21 million, or $6.5 million per point.

In April of 1979, Mead and Continental Group were acquitted in the criminal trial. Between April 1979 and May 1980, twelve other defendants settled for $17 million. Those settlements have not been finally approved by the trial court.

In June 1980, prior to commencement of the civil trial, the class approached the remaining non-settling defendants—Mead, Alton Box Board, and Westvaco—and offered to settle with them as a group for $40 million. Mead offered $8 million in response.

In July and September of 1980, Alton and Westvaco, during the course of trial, settled for $5 million and $1 million respectively. Mead never offered more than $8 million.

The day before the case went to the jury, the class representatives thought that in order to be responsible—not to be blackmailers or opportunists or gamblers—they had to go to Mead with a sensible settlement offer. We offered to settle with Mead, the day before the case went to the jury, for $36.5 million calculated in the following way. Continental Group had paid $6.5 million per percentage point of the market. Mead, paying the same amount, would have to pay $21 million. But Continental Group had paid that to the class one and two-thirds years earlier. So we had to add interest and that brought the total up to $26.4 million. And then because the class incurred expenses of at least $10 million for trying the lawsuit, we added that to $26.4 million and came up with $36.5 million. That settlement demand did not include one penny for punishment, not a penny demanded because Mead insisted on its day in court. When Mead received our written offer of $36.5 million, they stated "You must have misplaced a decimal point."

The case went to the jury the next day, and the jury returned a verdict that Mead and eighteen other companies conspired to fix prices for twelve years, from 1964 to 1975, and overcharged corrugated purchasers a minimum of 5%. The jury also found that the co-conspirators did not take affirmative steps to conceal their conduct from the purchasers.

Now based on the jury verdict and published sales data, we believe that the actual damage caused to over 200,000 American businesses by virtue of this price-fixing scheme, over the 12-year period that the jury found the conspiracy to have existed, amounted to a minimum of approximately $2.5 billion, or at least 5% of all the corrugated containers and sheets sold by all companies. But because of the jury finding of no concealment, we realized that the court might hold that the class could not recover for injuries sustained more than four years prior to filing suit. Now there is a sizable body of law ("the umbrella theory") that price-fixers are liable for overcharges caused by non-conspirators' sales if the prices of the non-conspirators are inflated by virtue of the co-conspirators. But we suspected that the court might hold that plaintiffs could not recover such overcharges from Mead. Therefore we calculated the actual damages part of our judgment based on 5% of the sales of the twenty co-conspirators only and only for 2-5/6ths years. According to sworn answers to interrogatories, that amounts to approximately $374 million, and would result in a judgment of approximately $800 million. That's $374 million times 3, minus the $321 million we received as settlement.

From September 13, 1980 (the day of the jury verdict), to June of 1981, we told Mead that if they were willing to pay more than $36.5 million, more than what we had offered the day before the jury verdict, that settlement negotiations would be fruitful. Mead, having gambled and lost, cavalierly responded that they might be willing to come up from $8 million if we were willing to go down from $36.5.

In July 1981, the class offered to settle with Mead, for $75 million calculated in the following way. Actual damages of $374 million for 2-5/6ths years, less settlements of $321 million, leaves the class short $53 million. If we asked Mead to pick up this actual damage shortfall of $53 million and if instead of trebling, we only added interest at 15% for 2-1/2 years—that's $75 million. Looking at it another way: 5% of Mead's sales during the period, times 3, is approximately $53 million. If Senate Bill 995 became law and were applied to this case, Mead's exposure would be $53 million. Add interest at 15% for 2-1/2 years and that's $75 million. Is that blackmail? Are we destroying Mead, a company with a net worth of over $800 million and profit last year alone upwards of $100 million?

Now if the class is willing to settle for that kind of money, which is 10% of Mead's exposure under current law—and we are willing to settle for that kind of money—then why are we so concerned about retroactivity? Because to date Mead's highest offer is only $28 million or 3.5% of its exposure under current law. If Senate Bill 995 is applied to this case and Mead's exposure is limited to $53 million, one would anticipate a Mead settlement offer of $1.8 million.

In evaluating the reasonableness of the class' position and the alleged hardship it might cause Mead, two other things should be noted. First, Mead has been informed that any offer over $50 million would be given serious consideration by the class representatives. Second, because Mead went to trial and was acquitted in the criminal case, whatever it pays in settlement will be totally deductible. With the sole exception of the Continental Group, only one-third of the other settling defendants' settlements were deductible. So, for Mead to pay, for example, what Olinkraft and Owens-Illinois paid, Mead would have to pay $32 million or $10 million per point. If you add interest and attorneys' fees and expenses to that, you're over $50 million.

So why is it fair to ask Mead to pay $75 million to the class? Mead was found to have fixed prices between 1964 and 1975, a period of 12 years. This was not an unintentional wrong; it was an intentional one. Unlike issues of merger law or dealer termination, there was no question about what the law was. In 1969, a Supreme Court decision found that Mead and others had been fixing prices. A lower court enjoined them from doing precisely what the jury found that they continued to do between 1973 and 1975. It's not a question of a corporation being caught by surprise. The Supreme Court in the Container Corporation case told Mead what the law was and nevertheless Mead ignored it. In fact, a regional marketing executive of Mead testified under oath at trial that he was fired after the Supreme Court decision because he refused to fix prices, and discouraged others from fixing prices.

And if after the jury's verdict there is any remaining doubt, about Mead's culpability, one should read the attached interview notes made by Mead's counsel in 1975 with 29% of Mead's plant managers and sales managers, who largely admitted that they fixed prices and ignored the mandates of the Container Corporation case. At trial a number of these managers along with 170 managers of Mead's competitors, invoked the Fifth Amendment and refused to testify. But Mead claims "we were acquitted in a criminal trial." Those lawyers who were in Houston and watched the criminal trial, know that the reason for that acquittal was because, unfortunately, government counsel were young and inexperienced and no match for the likes of Mead's lawyers.

Would making Senate Bill 995 retroactive be unfair to the 200,000 businesses that are class members? They had to pay a minimum of two and a half billion dollars more than they should have for their boxes for twelve years. Their actual damages from twenty companies for 2-5/6ths years amounts to $374 million. Interest on this at 10% per annum brings the total to approximately $500 million as of January 1, 1979. Even if you ignore interest, the settlements of $321 million are still short $53 million of actual damages. Instead of Mead's paying its fair share in settlement, the class has had to litigate for three years more, and even now the end is not in sight. Their out-of-pocket expenses have been in the millions. The time demanded of their executives was tremendous. Many were subjected to extensive discovery. Others sent their purchasing managers to Houston to testify at the trial. All this in reliance on what the current law was and what was at stake in the litigation. Indeed, had "claims reduction" been the law at the commencement of the trial, it is highly possible that the jury would have returned a larger verdict against Mead than 5% of sales for 2-5/6ths years. Mead explicitly presented to the jury the same unfairness argument it is now presenting to Congress. Had this argument been unavailable to Mead, the jury might have determined the overcharge was at least 7%, as testified to by plaintiffs' expert, rather than 5%.

Twenty-two settlements were approved in part because they expressly provided that the remaining defendants would be liable for all damages, less the amounts paid in settlement. The Fifth Circuit has already questioned—under existing law of no claims reduction—"Did those 22 companies pay enough?" You can imagine the answer that the opponents of the settlements will suggest if existing law is changed and if the remaining defendants are no longer liable for the remainder of the damages. There are a lot of people looking at these settlements, and a lot of people urging that even under existing law, the courts ought to disapprove them.

Fourteen settlements were entered into after the criminal trial and have not yet been approved by any court. At least two of these—Packaging Corporation of America and Alton Box Board—are at risk because the jury found them to be conspirators. Consider the situation of Alton. The class settled with it for $5 million because an independent accounting firm advised us that was all Alton could afford to pay. They should have probably paid, under any formula, $18 million. Alton's settlement has not been approved, and one wonders whether Alton's settlement can be approved if Senate Bill 995 is made retroactive. But a consequence of undoing the settlement and forcing the class to litigate with Alton might be to bankrupt Alton. By the way, Mead has never contended that it cannot afford to pay $75 million. If it did, upon verification by independent accountants, the class would accept whatever Mead could afford to pay, just as it did in the case of Alton and two other defendants. Is that unreasonableness?

Finally, it would undermine the free enterprise system and respect for law and order to make Senate Bill 995 retroactive. The first depends on vigorous enforcement of the antitrust laws by private businesses rather than Government bureaucrats. To encourage that, Congress provided treble damages, and the courts have consistently provided joint and several liability. Private enforcement would be greatly chilled if Congress set a precedent of removing these incentives retroactively in cases where such enforcement has already resulted in success.

We in the United States are proud that we live by a rule of law. That means that there are predictable consequences for illegal conduct. It also means that the law applies equally to rich and poor, large corporation and small business. For decades, corporations have been warned that if they fix prices, they will be liable, not only for damages caused by their acts, but also for damages caused by the conduct of their partners-in-crime. Mead had this warning—the Supreme Court expressly reiterated it to Mead in 1969—and Mead ignored it.

To make Senate Bill 995 retroactive would mean that if a corporation was rich and powerful enough, it could intentionally violate the law, refuse to compensate its victims for the damages caused, stand trial, and then if found liable, run to Congress and get the law changed. This is hardly the image of our legal system we would want our children or the world to have.

The **Chairman**. Now we have another panel here—if you gentlemen will step back and let them come up—Mr. Bruce Wilson, Mr. John Clute, Mr. Henry King, and Mr. David Foster.

Mr. King, I believe you have 10 minutes, and I believe the other time was divided, 13 minutes apiece, for the others.

Mr. **King**. Mr. Chairman, we would respectfully request the opportunity for 5 minutes of rebuttal at the end of the entire session, if that is all right with the chairman.

The **Chairman**. We will take a minute off everybody to do that.

Mr. **King**. Fine. I think we can arrange that. The first speaker in our panel will be Mr. Bruce Wilson.

The **Chairman**. All right.

Mr. **Bell**. Mr. Chairman, I would like to be heard on that. I have never heard of a rebuttal of a rebuttal. I thought we reserved time before we opened to rebut. Now I would like to know what Mr. King is going to rebut.

Mr. **King**. Perhaps I should have said surrebut. I would be glad to change the language, if that would serve.

The **Chairman**. Let me ask you this: You have a chance now to rebut anything that is said, just like you are trying a case. Why do you not do that now in your statements? Counsel says he understands that each side would have five minutes to rebut at the end. Whoever is going to rebut first. [Laughter.]

I do not know what you would call the next one—a re-rebuttal, I guess—a surrebuttal.

Mr. **Bell**. A surrebuttal on the common law pleading, but if you are going to have that, I would like to be the surrebutter. I would like to get the last word.

The **Chairman**. Well, suppose we alternate you? That is about as fair as we can do, I think. In other words, we would have two, and give them about three minutes each, and alternate them. That is about as fair as we can do, I think. You may proceed.

STATEMENT OF BRUCE B. WILSON, GENERAL COUNSEL, CONSOLIDATED RAIL CORP., PHILADELPHIA, PA.

Mr. **Wilson**. Thank you, Mr. Chairman.

My name is Bruce Wilson. I am general counsel of Consolidated Rail Corp. I want to thank you for the opportunity to appear before you today to discuss S. 995 and the proposals which have been made to make that bill retroactive to pending cases.

I will try to limit my remarks to a substantially shorter time than that which, under the rules, might be regarded as my market share. I have submitted a written statement for the record, and I would ask that that be inserted in the record at an appropriate point.

As you will see from that written statement, Consolidated Rail Corp. is a defendant in an antitrust case, which has been settled as between Conrail and the plaintiff; that case remains pending as to other defendants. I present my statement from that point of view.

I also spent a considerable portion of my adult life in the Antitrust Division as Deputy Assistant Attorney General, so I have done a good deal of worrying about antitrust enforcement and the procedures by which that enforcement is carried out. My statement also reflects a point of view gained from that experience.

Initially let me observe that there has been considerable debate over the effect of the existence of contribution on the amount of deterrence which is provided against violation of the antitrust laws. I have seen deterrence from two points of view now, both that of the antitrust prosecutor and that of the corporate counsel who tries to keep his client and its employees out of trouble.

I am fairly well convinced, on the basis of that experience, that the real deterrent against antitrust violations is simply getting caught. For individuals, the real fear is that of imprisonment, which, since 1974, can be for as long as 3 years. For corporations, the real fear is treble damage actions, although the $1 million fine also provided in 1974 certainly helps.

I think the nicety of who may ultimately be liable for how much does not really matter much when it comes to questions of deterrence. As I said, the real fear which I impress upon our employees is the fact that they can go to jail and that the corporation will spend a lot of money in treble damage actions—although I must say that when I tell them that the corporation may be liable for all the damages which may occur as a result of a conspiracy, that is a pretty scary prospect for most people.

With those preliminary remarks, let me turn to the two principal points which I would like to make in connection with this pending litigation. The first concerns the proposals to make this legislation, or the claim reduction portions of it, applicable on a retroactive basis.

This bill is one which is designed by its draftsmen largely to insure fairness. I think when we get to questions about applying this legislation retroactively, we really are talking about questions of fundamental fairness and people's expectations—expectations which were engendered when they entered into settlements or other transactions in connection with pending litigation.

We would be changing the rules under which that litigation and those settlements have been carried out and made. I think Senator East, when he was here, perhaps put his finger on it in some of the questions which he asked of the first panel.

These are transactions which were not entered into lightly. They are transactions the ramifications of which were well considered by the parties. These transactions were entered into, almost without exception, only after and upon the carefully considered advice of counsel, and they were entered into by skilled businessmen who are generally very careful in assessing the risks and the benefits which may flow from any particular action.

So we have a lot of reasonable expectations which have grown out of transactions and settlements which have already taken place, which necessarily would be changed by applying this legislation or any part of it retroactively.

Not only are settlements affected by retroactive application; it seems to me that one's whole litigation strategy in a lot of these cases has been conceived and carried out in the light of the then-known rules and in the light of then reasonable assumptions about litigation.

One of those assumptions was that contribution does not exist under the antitrust laws. Of course, there was an assumption that claim reduction probably could be fashioned by the courts but probably would be fashioned along the general rules of deducting the settlement from any judgment ultimately entered against the remaining defendants.

So we have here really two things, two sets of transactions—one, settlements; and, two, a whole series of litigation conduct which has been carried out upon the known rules and which application of S. 995 retroactively would change. I think this would engender unfairness to people who have entered into those transactions in a lot more ways than anyone in this room can possibly imagine.

My second point this morning really has nothing to do with retroactivity; it is a point that I really have not seen raised anywhere else. It is one arising out of a situation whose potential mischief really did not become apparent until last week, when Judge Thomas in the northern district of Ohio handed down a decision in that case involving Conrail.

As I said, we had settled that case. It was a case brought under both the Federal and the State antitrust laws. Judge Thomas, in his opinion, held that we had been correct in our evaluation that there was no such thing as contribution under the Federal antitrust laws, but he went on to hold, under the antitrust laws of the State of Ohio, that Conrail was not yet out of the case because there was a possibility that Conrail could be liable for contribution under the antitrust laws of the State.

It seems to me that this raises a situation, given the fact that we have 47 or 48 States which now have antitrust laws of their own—I think Louisiana and my own State of Pennsylvania are the only two that do not—47 or 48 States with antitrust laws, and 39 States and the District of Columbia with contribution in one form or another.

The combinations of those antitrust statutes and those State contribution laws give rise to a situation, I think, where we can have conflicting rules of law and even conflicting judgments on questions which, since they are cognizable under the Federal antitrust laws, may be assumed to involve matters of national economic importance.

We would therefore suggest that, if the Congress does pass a Federal antitrust contribution bill, it give a good deal of consideration to making the contribution remedy provided in that bill the sole contribution remedy where cases asserting violations of both Federal and State laws arise from essentially the same facts.

Mr. Chairman, that concludes my statement. I will be happy to answer any questions at the end of the panel's presentations.

The **Chairman**. Thank you. I believe Mr. Clute is next.

STATEMENT OF JOHN E. CLUTE, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, BOISE CASCADE CORP., BOISE, IDAHO

Mr. **Clute**. Thank you, Mr. Chairman.

I am senior vice president and general counsel of Boise Cascade Corp. of Boise, Idaho. I have previously submitted a written statement, and with your permission I would like to submit that for the record and merely summarize it at this time.

The CHAIRMAN. That will be all right. Without objection, that will be done.

Mr. CLUTE. Thank you.

The points I would like to make, that I have made in the statement, are essentially these: We are in wholehearted support of S. 995, as introduced. This is, as we all know, the same as S. 1468 that was introduced in the last Congress and passed this committee almost unanimously. The provisions in S. 1468 are identical in all respects to S. 995, including the provision that would apply it only prospectively. We think there is a solid need for legislation in this area, and instead of being merely a few dissidents supporting this position, as we were characterized this morning, I think the record would indicate otherwise.

The antitrust section of the American Bar Association—which has 289,000 members—has considered this issue very carefully and has come out in wholehearted support of S. 995, as introduced. The appropriate committee of the National Association of Manufacturers—with 11,000 members—after a very intensive lobbying effort by those who would seek to convert S. 995 into a private relief bill, reaffirmed its endorsement of S. 995, as introduced. No other major business organization that I know of has endorsed retroactive application of S. 995.

My company was a defendant in both the *Plywood* case and the *Corrugated Container* case. My remarks will be limited to those two cases, since most of the effort to change S. 995 comes from other defendants in those cases who have received adverse judgments.

I might say that those adverse judgments were handed down after S. 1468 was reported out of this committee, and at that time I did not notice that any of those companies were opposed to the bill as then written. The only intervening fact has been the adverse judgments.

We settled those cases, and we settled those cases only after a very careful consideration of all the factors. It was not an easy decision to reach; it was a very painful one.

As Judge Bell indicated this morning, we did not need a guardian to help us with that decision. By the same token, I do not think those companies who chose not to settle needed a guardian to help them with that decision. Ours was a decision arrived at after considering all the relevant factors. It was a painful settlement; it was an expensive settlement, but it did put behind us some great uncertainty, and now to be faced with an effort to restructure the rules after that game has been played I find quite unconscionable.

We have been asked from time to time why it is that we could not compromise or reach an agreement on an amendment to S. 995 which would accommodate our interests as well as accommodate those who would make it apply to pending cases. We have considered every proposal that has been discussed trying to make S. 995 apply to pending cases and we find that none of them can accomplish certainty as far as our settlements and the decisions that have been made on that basis are concerned.

We have had experience with a class action settlement that we entered into in 1973, where there was a totally meritless attack on that settlement long after it had become final. It took us almost 5 years, almost $400,000 in legal fees, and great uncertainty created with our shareholders, with our lenders, and with the credit rating agencies before that attack, found to be baseless by the U.S. District Court the Ninth Circuit Court of Appeals, and the U.S. Supreme Court was finally resolved.

We think it is not appropriate to be subjected to another effort like that. If this bill goes into effect with an amendment to make it apply to pending cases, we would most assuredly—and we have heard that confirmed this morning—be subjected to a similar sort of attack or multiple attacks. That would be unsettling. It would be particularly unsettling to credit rating agencies, potential investors, and lenders in these economic times, and could do serious and irreparable harm to our expansion programs and our capital investment program.

Lastly, it has been alleged by those who are most in favor of making S. 995 apply to pending cases that, if that is not done, there are going to be extremely dire consequences, including potential bankruptcy, for those companies. We, quite frankly, do not believe that to be the case. We think settlements on a reasonable, if nevertheless painful basis, were available and are available, and that, if the nonsettling companies would seek settlements, aggressively, they even now could limit their exposure to an amount that they could tolerate.

I would like to make one last comment, which is sort of a personal one but also on behalf of Boise Cascade, and that is that I am personally offended by the characterizations being made, I think irresponsibly, by the proponents of making S. 995 apply to pending cases. Those characterizations—that all of those who settled are guilty of some sort of conspiracy or are guilty of violation of the antitrust laws—are without any basis, and the individuals and the companies making those characterizations should know better.

I think the record speaks for itself as to which companies have gone through trial and which companies have had a jury determine the facts.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Clute.

Mr. King, you are next.

STATEMENT OF HENRY L. KING, LAW FIRM OF DAVIS POLK & WARDWELL, NEW YORK, N. Y.

Mr. KING. Thank you, Mr. Chairman.

My name is Henry King. I am a partner in the law firm of Davis Polk & Wardwell. I have been practicing in the field of antitrust law for a good number of years. I have advised companies both on the plaintiffs' and the defendants' side, though more on the latter, and have acted as trial counsel in a number of cases. In the *Corrugated* case I represented International Paper Co.

We have prepared a written statement which I previously submitted, and I respectfully ask that it be incorporated as part of the record. It is not my intention to read or summarize that statement but rather to make some points which I think——

The CHAIRMAN. Without objection, your statement will be placed in the record.

Mr. KING. I would like to put in perspective the position that we have had consistently throughout this matter since S. 995 was originally introduced.

We support S. 995, as introduced. We think that contribution and claim reduction provide a wise and needed amendment to the U. S. antitrust laws. Our problem comes because of the attempt to make it, or any part of it, retroactive. Our objection to retroactivity is based on two factors.

The first is a matter of policy. We do not like any laws that are retroactive, much less antitrust laws. We think that it is unwise policy for the Congress to change the substantive rules retroactively. Companies and people ought to know what the rules are and how they should be guided, and to change the rules retroactively, we think, is unwise as a general policy matter.

But more than that, we oppose this attempt to make claim reduction retroactive because of the impact that it would have on pending cases. I would like to use the *Corrugated* case as an example, to demonstrate the problems that would be inherent if the Congress were to do that.

The *Corrugated* case was brought about 6 years ago in Houston. There were 37 original defendants; 36 of those defendants settled. They put up, in the aggregate, well over $300 billion to settle the case. At that time, and today, that constituted the largest settlement in the history of antitrust class actions.

Only 1 of those 37 defendants felt that they should not settle, and that was the Mead Corp. Knowing all of the facts, and knowing what the risks were, they decided to go to trial and take their chances of not having to contribute anything to that settlement fund. They went to trial, and they lost before a jury.

Our concern is that, if they now have the law changed after that jury verdict has been entered, to relieve them of the substantial liability that the jury found against them, there will be repercussions that would affect the rights of the settling defendants.

Each of the settlement agreements that were entered into in the *Corrugated* case contains a clause which specifically says that the plaintiffs reserve their right to proceed against the remaining defendants for the full amount of their damages. That is something that the plaintiffs insisted go into those agreements, and the settling defendants agreed to that clause.

When the agreements were submitted to the court for approval, the district court noted that provision and specifically stated that that was an important part of the consideration he was giving to the approval. He quoted from that provision and specifically said this was "an important consideration, in my view." The agreements were submitted to the class on notice to the over 200,000 class members, on that basis, and final approval was given on that basis to all the agreements that had been reached up until that time, totaling $298 million.

There was a dissident group of plaintiffs who felt that that amount of money, though unprecedented, was not sufficient and should have been higher. That dissident group of plaintiffs took an appeal to the Fifth Circuit. The Fifth Circuit, after long consideration, delving into the record and remanding the case to Judge Singleton for further findings, which Judge Singleton made, finally approved those settlements. In the opinion approving the settlements, the Fifth Circuit again noted the provision of the settlement agreements that the plaintiffs had reserved their right to proceed against the remaining nonsettling defendants for the full amount of their damages.

In light of that history of settlement negotiations, settlement approvals, class action notice, appeals, and affirmances, all on the basis that there was to be no claim reduction and no carve-out, for the Congress to come in and say to all of the parties and to the courts, "Undo all of that; forget everything that has happened and all of that history, and start all over again," we think raises very troubling questions.

It is easy for them to say on the other side of this issue that there is no constitutional question presented, that the Congress has the power, that the settlements will not be set aside, that the legislation is entirely lawful. If the legislation should pass, I must say I would be the first to stand up in court to try to preserve those settlements. But nobody can be assured that that is what is going to ultimately be held by the courts.

One thing that is absolutely certain is that the issue will be litigated. Certainly the dissident plaintiffs who took the appeal to the Fifth Circuit on the ground that $300 million was not sufficient will use every ground they can possibly muster to upset those settlements, and they will be in court attempting to set aside those settlements on the ground that the very basis upon which they were entered—to wit, no claim reduction—has been frustrated by the action of the Congress in adopting a retroactive law.

I say that that litigation alone would create enormous uncertainty, enormous expense on the part of all of these settling defendants, and would expose them to the risk that their settlements might indeed be set aside. Judge Bell, in his statement to the chairman, recognized this point. He said, "Maybe those settlements should be set aside and the money given back, and let all of the defendants go to trial all over again."

Well, Mr. Chairman, we do not want that. The settling defendants paid that unprecedented amount in order to buy their peace, so that they would not have to face the cost and risks of litigation. We do not want to litigate all over again; we want our settlements to be upheld without the necessity for further litigation.

When a predecessor bill to this one was introduced in 1979, S. 1468, it contained identical language to the bill that you have introduced, Mr. Chairman, in that it applied prospectively only. It had subdivision (e) in it, which said that it applied only to actions commenced after the date of enactment.

At that time not one of these companies made any statement that they did not like the bill or did not like the prospectivity feature of it. It was only after they lost the jury verdicts that they have sought to get redress from the Congress to bail them out from decisions they made themselves.

I am not unsympathetic to the position that they are in, in having to face judgments of enormous amounts, but the fact is that in both the *Plywood* case and the *Corrugated* case they can settle, as Mr. Susman has indicated today, and as Mr. Kohn has indicated on other occasions, for amounts that represent a mere fraction of what their judgments would be. In light of that, we do not see why the risks should be shifted from them to all of the settling defendants, the risks of further litigation and the risks of uncertainty.

The CHAIRMAN. I believe your time is up, Mr. King.

Mr. KING. Thank you very much, Mr. Chairman. I would like to reserve 3 to 5 minutes in rebuttal or surrebuttal.

The CHAIRMAN. Mr. Foster?

STATEMENT OF DAVID L. FOSTER, LAW FIRM OF WILLKIE FARR & GALLAGHER, NEW YORK, N.Y.

Mr. FOSTER. Thank you, Mr. Chairman.

My name is David Foster. I am a member of the firm of Willkie Farr & Gallagher in New York. I was the chairman of the Civil Practice and Procedure Committee of the ABA Antitrust Section who first appointed the committee that drafted what is called the bar association report on the subject of contribution. I continue to be active in that association as a member of the council of the antitrust section.

I want to be clear that I am not here today speaking for the bar association. Indeed, the antitrust section's report speaks for itself in recommending that contribution legislation be prospective only. Nor am I in the same position here today as the other members of the panel upon which I sit. I am here today as the representative of a plaintiff corporation which stands to lose the major portion of a judgment which it has fought for and obtained if retroactive claim reduction is applied to our case.

I will speak specifically about the situation of Burlington Industries, whom I represent, and Milliken & Co., the defendants in that case. However, I should say that there are considerable numbers of plaintiffs who are in a position like Burlington.

One entire group of those plaintiffs is the plaintiffs, the citizens and States of the United States, who are represented by the attorneys general. I would ask at this time to read into the record a word or two from the letter written by the National Association of Attorneys General to the chairman on the subject of retroactivity of claim reduction, dated August 14, 1981.

These plaintiffs say,

> From our perspective on the nation's legal system, retroactivity goes beyond bad law and bad policy; it would also have a drastic impact on the hundreds of antitrust cases which state Attorneys General are now prosecuting.

The letter also states, "For the Attorneys General who prosecute such cases, this principle"—that is, claim reduction—"applied retroactively in this bill would operate to frustrate basic, sound antitrust policy."

The letter continues to describe and set forth quite eloquently the opposition of the National Association of Attorneys General to retroactive application of claim reduction to pending cases.

In addition, we have in hand a list of 131 companies opposed to applying S. 995 to pending cases. I would ask permission to add this particular list to the prepared testimony that I have already submitted, and I ask that both be made a part of the record in this proceeding.

The **Chairman**. Without objection, it is so ordered.

Mr. **Foster**. I would state parenthetically that this list of 131 companies was assembled in a few days of telephone calling, so the perception of Judge Bell that the business community has come around to approve some retroactive application of this statute is apparently not shared by the companies that we were able to contact in a few days.

I have three basic propositions to advance here on behalf of plaintiffs whose judgments will be eviscerated if claim reduction is applied retroactively.

RETROACTIVITY UNFAIRLY UPSETS CONTRACTUAL RIGHTS

The first proposition is, it is unfair to overturn the existing law on the basis of which parties have contracted for settlement and, as the lawyers say, have changed position in reliance. This is illustrated by the *Burlington* case, which arises from an illegal horizontal conspiracy of competitors to exact royalties from purchasers of textile machinery.

I should say, when I speak of Milliken throughout, I am speaking of Milliken, the corporation; I am not talking about any individual person by that term.

The litigation between Burlington and the Milliken Corp. commenced in 1969. There was a separate suit against the company now found to have been Milliken's coconspirator. This was not a class action; it was not a lawyer's case within Judge Bell's formulation; it is Burlington, not the lawyers, whose interests are at stake here. Burlington has paid full freight for the legal services which have been involved in prosecuting these cases.

In 1974 Burlington settled with the coconspirator of Milliken. Milliken had the opportunity to settle on the same ground and rejected it. I have before me a transcript of a hearing in this very case in which the court asked, "Why has the case not been settled?" This occurred on March 26, 1976. The *Leesona* settlement was outlined to the court by Burlington's counsel, and Milliken's counsel said, "We are not prepared to operate in that kind of territory at all."

So I would ask. "Is it a sweetheart deal when the same settlement terms are offered to both conspirators, one accepts, one rejects, and the one that rejects goes to trial, loses, and is subjected to judgment?" That is what happened in our case. Certainly no claim of "sweetheart deal" would be appropriate.

Throughout the case, the eight- to nine-month trial that was conducted on liability, it was assumed by everyone that the stake was all of the royalties that had been paid to both conspirators—that the joint and several liability concept applied fully. To overturn that now would, I submit, be extremely unfair.

RETROACTIVITY VIOLATES CLAYTON ACT POLICY

Second, it is unfair to apply S. 995 retroactively in light of the Clayton Act policy. It has been said that there are uncertainties and unfairnesses because liability is uncertain in antitrust cases and can be proved circumstantially.

In the *Burlington-Milliken* case the issue was whether the competitors had entered into a settlement of patent litigation for the purpose of preserving their production royalty programs. There was introduced into evidence the specific statement by the chief executive of one of the conspirators as follows—and I am quoting from 444 F. supplement at 679—"Everything to settle, so that all competitors charge a royalty." Under those circumstances, it can hardly be said that that case was proven on the basis of uncertain evidence and circumstantial proof.

The Clayton Act says that the parties are entitled to three times the damages they have sustained. In this case, we filed in 1969. We have not been entitled to get prejudgment interest, because, while the Congress has in the meantime passed the bill for prejudgment interest for antitrust plaintiffs, it has in its wisdom chosen to make that bill prospective only, so we do not get any prejudgment interest.

BURDEN OF RETROACTIVITY UNFAIRLY RESTS SOLELY UPON PLAINTIFFS

If you take the amount of the damages from the royalties just for the Millikens, and you apply interest to it, and you reflect the fact that we are being paid in inflated dollars—diminished dollars—today, the entire judgment that we have received does not compensate us for the treble damages we would be entitled to under the statute.

Lastly, there is the proposition that this is unfair because the entire burden of retroactivity rests upon the innocent plaintiffs. That is true even if any version of S. 995 is made retroactive, but it is particularly true under the new proposal that has been advanced today, because it has become extremely clear with the new proposal, which abandons any retroactive application of contribution and applies S. 995 retroactively only to claim reduction.

It has become very clear that the Congress will be saying, "We won't do it at all unless we can do it at the expense of the plaintiffs." Mr. Susman referred to that revised provision as gerrymandered. That is a good term. It is a mangled distortion of the bill presently before the Congress. It does not meet the needs which are met by S. 995. It is plainly and simply nothing more than a price-fixer's relief act for the benefit of a few specific companies.

RETROACTIVE "BAIL OUT" DIMINISHES DETERRENCE

Aside from the fundamental unfairness of retroactive application at the expense of plaintiffs, there is the question of perception. The question of perception comes to this: "Is it open in our society for adjudicated price-fixers to come before the Congress and be relieved of the damages they have sustained?"

We have in our very case a specific statement that bears upon that, the statement of the Milliken executive who was the architect of the conspiracy. The question I would leave the committee with is, does this statement represent the views of the Congress today? Here is what the executive said: He said, "It is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws, and the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly." Passage of the Bell amendment would indeed show that that executive was right when he made those observations.

The CHAIRMAN. Thank you very much. We have a few questions here now we would like to propound to you, gentlemen.

Mr. King, if you agree that, as a general principle, it is inequitable for a single defendant to pay more than his fair share of the damages he caused, why is it fair to have defendants in pending cases subject to liability far in excess of their share, simply because they do not settle like other defendants in any given case?

Mr. KING. I think the trouble is that the verdicts have already been entered and the settlements have already been approved on the basis of existing law. If that law changes, it raises troubling due process questions. The questions are whether or not the settlement agreements entered into on the basis of existing law are not being frustrated.

We are not concerned about Mead being relieved of some liability; what we are concerned about is that that will result in the settling defendant having to pay more in litigation expenses or having to go to trial all over again because their settlements would be set aside.

The CHAIRMAN. Mr. Clute, one of the express purposes of this legislation is to prevent plaintiffs from abusing the system by whipsawing defendants into unreasonably large settlements far out of proportion to their share of the harm caused. Why should not this principle apply to pending cases as well?

Mr. CLUTE. I think I would say substantially the same thing that Mr. King has. We do support that concept. We do think it should apply prospectively. If it is applied to pending cases though, it could upset the settlements and subject us and a number of other companies, many other companies who, in good faith, entered into settlements, with having to go through the entire process again under dramatically different rules today than existed when we had to make those painful decisions back several years ago.

Mr. KING. Mr. Chairman, may I amplify on that answer?

The CHAIRMAN. All right.

Mr. KING. I guess that if it is made retroactive to apply to cases where there have been no settlements, so that the settlements are not at risk, or where there have been no verdicts or judgments entered—that is to say, if it was made retroactive to the ordinary case still in pretrial procedures—we would not have any objection to that.

Our concern is—and where retroactivity bites—where action has already been taken by the parties and by the courts in rulings and in settlements on the basis of existing law. If you change it as to those cases, you run into all of the legal problems that we have described. But if you apply the law to those cases where none of that has occurred, then the advantages of the law can be obtained in pending cases, but the rub is that the lawyers representing Mead, Georgia Pacific, & Milliken are not satisfied with that, because it does not help them in their specific cases, because they have already lost jury verdicts.

We would have been happy to compromise on the basis that I have outlined, but the losing parties in those cases would not accept that as a compromise because it does not have the effect of reducing their judgments.

The CHAIRMAN. Mr. Wilson, you have argued that applying S. 995 to pending cases would fly in the face of the legal certainty of no contribution under which pending cases were litigated. Given the split in the circuit courts regarding contribution which has been resolved only recently and the fact that Congress has been considering contribution legislation for several years, is it fair to say that all pending cases have been litigated with absolute legal certainty that contribution in claim reduction was not possible?

Mr. WILSON. No, Mr. Chairman, I do not contend that it was absolute legal certainty with respect to those principles. I think, however, that competent lawyers in this area generally would have reached the conclusion that it is far more likely than not that there would be no contribution in antitrust cases and would have predicted the Supreme Court's decision in the *Texas Industries* case as it in fact came down in the opinion by the Chief Justice.

I think it is really a question of what were the reasonable expectations of parties under the law as it existed at the time those settlements were made. If those reasonable expectations are later disturbed, then I think the Congress will have dealt unfairly with the people that had those expectations at the time they did those transactions.

The CHAIRMAN. Mr. Foster, if the Lacovara amendment were adopted, would the only issue facing a court be whether that provision is constitutional, and, whichever way that was resolved, the settlements would not be subject to attack? And would it follow that, if no settlements would be overturned regardless of how the constitutionality of the Lacovara amendment was determined, settled defendants would not have to get involved in further litigation?

Mr. FOSTER. The first step after the passage of the Lacovara amendment would be a period of uncertainty and litigation in all pending cases with respect to the constitutionality of the statute.

Ultimately, if the Supreme Court were to rule that the statute was proper, I suppose that there would then be a case-by-case assessment as to whether it would be manifestly unjust in a particular case to apply the statute.

Senator Ervin used a very delightful expression; he said that the term "manifestly unjust" was "beautiful but indefinite," which it clearly is. If it is the constitutional standard, it is a very high standard indeed; if it is some other standard—which apparently Judge Bell feels it is—no one can articulate what that standard is.

So that in every case we would be facing a period of years of litigation and uncertainty affecting plaintiffs who have today established their right to judgments for violations of the antitrust laws.

The CHAIRMAN. Mr. Foster, would the settled defendants have to get involved in that litigation?

Mr. FOSTER. Inevitably, yes, they would. To be very specific, if it were to develop that Burlington's claim against Milliken were subject to claim reduction, we would recommend to Burlington that Burlington go back to the district court in Florida and reopen the case against Leesona, a case that has been years dead now. We would ask to reopen that case, and we would ask Judge Atkins down there to let us try that case from the start, which would be like shooting fish in a barrel at this stage, since we have already established the illegality of the combination. But it would represent years of burden on the court and burden upon Leesona. In this regard, the real burden is more upon the courts and the defendants than it would be upon us, if we could get it reopened, which I am not sure of.

The CHAIRMAN. Thank you very much.

[The aforementioned material follows:]

Companies Opposed to Applying S. 995 to Pending Cases:

	Company	State
1.	Russell Corp.	Alabama
2.	Cone Mills	North Carolina
3.	Avondale Mills	Alabama
4.	Blue Bird, Inc.	Pennsylvania
5.	Texfi Industries	North Carolina
6.	Springs Mills	South Carolina
7.	Beacon Mfg. Co.	North Carolina
8.	Gressel Produce Co.	Ohio
9.	Gulf States Paper Corp.	Alabama
10.	H. D. Lee Co.	Kansas
11.	Hercules, Inc.	Delaware
12.	H. H. Wilson Corp.	Pennsylvania
13.	H. P. Hood, Inc.	Massachusetts
14.	Industrial Container Corp.	North Carolina
15.	International Salt Co.	Pennsylvania
16.	Mid-States Container Corp.	Ohio
17.	Glen Raven Mills	North Carolina
18.	Graber Industries	Wisconsin
19.	Lawtex Industries	Georgia
20.	Seabrook Foods	Georgia
21.	American Enka Co.	North Carolina
22.	Akzona, Inc.	North Carolina
23.	Superior Brand	Ohio
24.	Anchor Container Corp.	Pennsylvania
25.	Carolina Enterprises, Inc.	North Carolina
26.	Riegel Textile Corp.	South Carolina
27.	Theresa Friedman & Sons	Pennsylvania
28.	Hinkle Mfg. Co.	Ohio
29.	Hon Industries, Inc.	Iowa
30.	John Norton Farms, DBA: J. R. Norton Co.	Arizona
31.	Kemp Furniture Industries, Inc.	North Carolina
32.	Kiddie Consumer Durables	Pennsylvania
33.	Lamar J. Guthrie	Alabama
34.	Lasko Metal Products, Inc.	Pennsylvania

35.	Luden's Inc.	Pennsylvania
36.	Alabama Poultry Supply Co. Inc.	Alabama
37.	Jack Opler Sales Co., Inc.	Alabama
38.	Martin Industries, Inc.	Alabama
39.	Birmingham Packaging Corp.	Alabama
40.	Amerace Corp.	Alabama
41.	Amerex Corp.	Alabama
42.	Courtaulds	Alabama
43.	M & B Metal Products	Alabama
44.	Montgomery Packaging Corp.	Alabama
45.	Alexander Dawson, Inc.	Nevada
46.	Winnemucca Farms, Inc.	Nevada
47.	Allred's Inc.	Utah
48.	Atex, Inc.	Utah
49.	Bennett's Glass Division	Utah
50.	Browning	Utah
51.	Capital Glass & Aluminum Corp.	Utah
52.	Concept Industries Corp.	Utah
53.	Davis County Co-Op	Utah
54.	Desarose	Utah
55.	Desert Book Co.	Utah
56.	Glade Candy Co.	Utah
57.	J. B.'s Big Boy Family Restauants	Utah
58.	Huish-Bult, Inc.	Utah
59.	Koret of California	Utah
60.	Mountain Valley Egg Producers	Utah
61.	Norbest Inc.	Utah
62.	Olympia Sales Co., Inc.	Utah
63.	Blue Bell	North Carolina
64.	Plastronics Corp.	Utah
65.	Roto Aire Filter Sales	Utah
66.	Sorority, Inc.	Utah
67.	Specialty Distributors	Utah
68.	Sweet Candy Co.	Utah

69.	Utah Pet Foods, Inc.	Utah
70.	Utah Turkey Growers, Inc.	Utah
71.	Wm. C. Parker& Sons Co.	Utah
72.	International Paper Co.	New York
73.	Boise Cascade	Idaho
74.	Union Camp	New Jersey
75.	Southwest Forest Industries	Arizona
76.	Burlington Industries, Inc.	North Carolina
77.	Pretty Products, Inc.	Ohio
78.	Maytag Corp.	Iowa
79.	Blue Star Foods, Inc.	Iowa
80.	Tenneco	Texas
81.	Manville Corp.	Colorado
82.	Scotch Plywood	Alabama
83.	Consolidated Packaging	Illinois
84.	Conrail	Pennyslvania
85.	White Poultry Co.	North Carolina
86.	Wear-Ever Aluminum	Ohio
87.	Webster City Products	Iowa
88.	Chatham Mfg. Co.	North Carolina
89.	Glascow-Bridges, Inc.	North Carolina
90.	Mrs. Paul's Kitchens, Inc.	Pennsylvania
91.	Globe Ticket Co.	Pennslyvania
92.	Liggett & Meyers Co.	North Carolina
93.	Liqui Box Corp.	Ohio
94.	Lumbee Farms	North Carolina
95.	Marathon Carey-Mack Fall	Pennslyvania
96.	Marshall Durbin Food Corp.	Alabama
97.	Rubbermaid, Inc.	Ohio
98.	Shuford Mills	North Carolina
99.	Lee A. Consul Co.	Arizona
100.	K-Mart Corp.	Nevada
101.	Blue Ribbon Meat Co.	Nevada
102.	J-V Co.(division of MTL, Inc.)	Nevada
103.	Stolle Corp.	Ohio

104.	Intermountain Jobbers Supply	Utah
105.	Admiral Beverage Corp.	Wyoming
106.	Cream of the Valley Dairies	Wyoming
107.	Wedco Mfg., Inc.	Wyoming
108.	Y-Tex Corp.	Wyoming
109.	Bandag	Iowa
110.	American Popcorn Co.	Iowa
111.	American Fiber (Volpe Mfg. Co.)	Pennsylvania
112.	Eastern Packaging, Inc.	Pennsylvania
113.	American Chewing Gum, Inc.	Pennsylvania
114.	Bercon Packaging, Inc.	Pennsylvania
115.	Allied Corrugated Container Corp.	Delaware
116.	Delagra Corp.	Delaware
117.	Jennie-O Foods, Inc.	Minnesota
118.	JCI Americas, Inc.	Delaware
119.	The American Original Corp.	Delaware
120.	The Crowell Corp.	Delaware
121.	Vukasovich Co.	Arizona
122.	Container Service Co. of Arizona	Arizona
123.	Goldmark All Beef Products	Arizona
124.	J. A. Wood Co.	Arizona
125.	Action Produce	Arizona
126.	Bradley Produce	Arizona
127.	Sun Country Citrus, Inc.	Arizona
128.	Venco Eggs, Inc.	Alabama
129.	Dixie Vault Co.	Alabama
130.	Madison Equipment Co.	Ohio
131.	Carl Weissman & Sons, Inc.	Montana

STATEMENT OF JOHN E. CLUTE

SENIOR VICE PRESIDENT AND GENERAL COUNSEL

BOISE CASCADE CORPORATION

BOISE, IDAHO

My name is John E. Clute, Senior Vice President and General Counsel of Boise Cascade Corporation. I would like to thank this Committee for the opportunity to appear today in support of contribution in antitrust cases. My remarks will be confined to Section 4 I.(e) of S. 995. This provision properly limits the bill's application to cases filed after the date of enactment. Prospective application of S. 995 is of utmost importance to Boise Cascade Corporation and many others. We respectfully submit that any contribution statute should apply only prospectively, since it eliminates legal inequities and complications, administrative expenses, and uncertainties which otherwise might arise.

I would like particularly to discuss Section 4 I.(e) in the context of the Plywood and Corrugated Container cases, in which our Company was a defendant, since among the principal advocates of having S. 995 apply to pending litigation are four defendants in those cases.

At the outset, it should be noted that Section 4 I.(e) is identical to a provision in S. 1468, the contribution bill passed by this Committee during the last Congress. Traditionally, Congress has acted prospectively when creating new rights under the antitrust laws, and courts have taken the same approach. The American Bar Association's Section of Antitrust Law in 1979 approved proposed contribution legislation which applies purely prospectively, refusing to embrace the concept of retroactivity. It is simply unfair to apply a new law retroactively when major decisions have been made in reliance on what the law was at the time.

Plywood and Corrugated Container Cases

For more than seven years Boise Cascade has been involved in antitrust litigation in the plywood and corrugated container industries. In 1977, Boise Cascade settled the Plywood cases, after others had done so, despite our certain beliefs that no violation of law had occurred. The settlement was dictated by our conclusion that it was the most prudent business decision in light of our expectation of heavy litigation expenses, the uncertainties that face any major corporation in a jury trial, and the tremendous potential liability confronting us were we to be unsuccessful at trial. We did not believe we could gamble the future of our company and at the same time fulfill the responsibilities we have to our shareholders. We thus accepted a painful settlement. I might add that in 1980, long after the Plywood cases were settled, the Ninth Circuit Court of Appeals vindicated our company and other plywood producers, in the related Federal Trade Commission action finding that no violation of law had occurred.

We were also not the first to settle in the Corrugated Container cases. Our reasons for settlement were similar to those in the Plywood cases.

Three companies did not settle in the Plywood cases and one company did not settle in the Corrugated Container cases. These four companies were found by their respective juries to have violated the antitrust laws. Subsequently, the United States Supreme Court confirmed that there was no right of contribution in antitrust cases. Now these companies are asking you not only to change the law but to apply it retroactively to the Plywood and Corrugated Container cases for their benefit and to the detriment of all who have settled. These companies well understood the law as it existed when the settlements were reached and as it still exists today. They too could have negotiated settlements comparable to those obtained by other defendants. They chose not to do so.

We have sympathy for these companies. We believe they should never have been found liable on the merits. Additionally, we feel they have solid grounds on which to challenge the judgments due to judicial error. But that is not the issue here. We all played the game by the rules then existing. They lost and now ask Congress to change the rules, even though, at a minimum, such a change would punish the companies that chose to settle by miring them in protracted and expensive new litigation. Thus, retroactive application of S. 995 would penalize us now for decisions made in good faith years ago in reliance on existing and universally understood law.

Danger of Rescission

Those supporting application of a contribution bill to pending cases have consistently asserted that the settling defendants in the Plywood and Corrugated Container cases should be protected from further risks and expenses. Yet no one has shown us that any of the proposed amendments would protect the settling companies from such expense and exposure. We do not believe it is possible. We have carefully considered each of their proposed amendments and cannot find any that is satisfactory. No matter what language is used, if the statute is applied to pending cases, someone will almost certainly seek rescission of the settlements on the basis of failure of consideration or on constitutional grounds. Cases which we settled years ago will be resurrected, costing us additional heavy litigation expense.

This is not empty rhetoric. Years after final court-approved settlement of a class action unrelated to these antitrust cases, Boise Cascade was required to defend an absolutely meritless collateral attack on the settlement. The settlement was approved by the court in 1973 and a collateral suit, for $1.8 billion, was filed in May, 1977 by one of the class plaintiffs who participated in the settlement. After continual sparring in court for over a year and one-half, we were granted summary judgment by the trial court which dismissed the case in November, 1978 in a strongly worded opinion chastising the plaintiff for bringing the suit. Plaintiff appealed to the Ninth Circuit Court of Appeals, which took two and one-half years, until May, 1981, to unanimously affirm the dismissal. Plaintiff sought rehearing, which was denied. A petition was filed with the United States Supreme Court for a writ of certiorari, which also was denied two months ago, December, 1981. Because of the enormous size of the prayer, $1.8 billion, we have spent untold hours with our management, our stockholders, our independent auditors and the investment community discussing the suit. We had to include it in our periodic financial reporting to government and to the public. In addition, we have spent over $300,000 in legal fees since the settlement became "final" defending this wholly meritless suit seeking to set aside this settlement. It has occupied both federal and state courts from the trial level up through the United States Supreme Court for five years. We submit that, if S. 995 is applied retroactively, a similar fate awaits each of the thousands of plaintiffs and defendants who finally settled in the Corrugated Container and Plywood cases years ago. Moreover, many other burdens and inequities would be faced if S. 995 were to apply retroactively to these and other cases. Several are set forth in the letter sent by our counsel to the Chairman of this Committee, Senator Strom Thurmond, in May of last year which, for your convenience, has been attached to my statement.

Constitutional Doubts

There are serious doubts about the constitutionality of the application of S. 995 to pending cases, but others here today with greater constitutional expertise than I plan to discuss that issue.

Availability of Settlements

It has been suggested that some of those seeking your help through retroactivity are on the brink of disaster and that their very survival depends on your action. In our opinion, this is not true. We believe settlements have been continuously available to these companies and remain available today. For example, Stephen Sussman, lead attorney for the Corrugated Container plaintiffs, told Senator Thurmond in a letter last June 11 of repeated offers to The Mead Corporation over many months to settle at between $3 million and $37.5 million. There is widespread belief that Mead today still can settle at a small fraction of the exposure it otherwise faces should damages be fixed by the court.

We respectfully submit that the Committee should continue the path of its predecessor and approve legislation applicable only to future cases. To do otherwise will continue to split the business community, jeopardize the legislation, and, if passed, add substantially to the burdens of the already over-burdened judiciary. Only a handful of companies, having knowingly gambled and lost, now fight against the non-retroactivity of Section 4 I.(e). The vast majority have been unwilling to support their efforts. We respectfully submit that the wisest and most equitable course to take is to retain the applicability section unchanged.

Statement of

BRUCE B. WILSON
General Counsel
Consolidated Rail Corporation

Mr. Chairman and Members of the Committee:

It is a pleasure to be here with you this morning to discuss the provisions of Senate Bill 995, and especially proposed changes to it which may affect cases already pending in the courts. My name is Bruce B. Wilson. I am presently General Counsel of Consolidated Rail Corporation with responsibility for litigation and antitrust matters. From 1971 to 1976 I served as Chief Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice.

S. 995 generally would establish a right of contribution among antitrust defendants. A great deal of the debate concerning this bill has centered upon issues of fairness. It is fair that one of several antitrust violators might have to bear the entire amount of a plaintiff's recovery? Is it fair that one antitrust defendant might settle cheaply and at an early stage with a plaintiff, thus avoiding much greater potential liability later, while at the same time providing money for the plaintiff to pursue its action against others and in general giving aid and confort to the plaintiff?

Other arguments have centered upon how best to deter antitrust violations. Is it a greater deterrent that one conspirator might perhaps have to pay the entire consequences of the violation, or is greater deterrence provided by the fact that, with contribution, a violator will almost certainly have to pay something if caught?

As a former antitrust prosecutor, and now as corporate counsel, I do not believe the creation of a right of contribution would provide any additional deterrent effect, or would take away deterrence which now exists. The net effect is probably not much. The prospects of criminal sanctions and of treble damage suits serve, I believe, as sufficiently strong deterrents in and of themselves. And it seems at least as necessary to be fair to those injured by antitrust violations as it is to assure fairness among the violators.

These questions of fairness and deterrence are especially appropriate for resolution by the Congress rather than the judicial branch. As the Supreme Court recognized in Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2070 (1981):

> "The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is 'fair' in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit."

S. 995 as introduced would provide for contribution in future price-fixing cases based upon the market shares of the conspirators. The apportionment of a liability according to percentage of market--as provided by S. 995--is at least predictable. In many cases, it may also offer some rough measure of responsibility--although the Congress should realize that some "ringleaders" of conspiratorial conduct will be let off lightly in terms of their culpability while other "reluctant participants" fare badly. Predictability is, however, an important element both in business transactions and in litigation. The approach of S. 995 therefore seems preferable to, for example, the approach embodied in Assistant Attorney General Baxter's draft bill, which would permit contribution in a broader range of cases but in which comparable guidelines for assessing relative liability are wholly lacking. As a result, Mr. Baxter's approach would sanction sheer speculation; the important element of predictability would be sacrificed. The difficulty of providng a reasonably certain measure of contribution in other than price-fixing cases seems to make unwise any expansion of the bill to cover situations not involving price-fixing.

My primary focus today, however, is whether any right of contribution and any legislation providing for that right should be applied in cases which are now pending before the courts.

S. 995 as introduced is properly limited in application to cases filed after its effective date. The retroactive application of a contribution statute--which would be a statute designed in large part to insure fairness--itself raises questions of fundamental fairness. Retroactive application of any contribution statute would undoubtedly call into question a number of settlements and transactions which have already been completed and which were entered into according to the then known rules of antitrust litigation. These transactions were done in the belief, widely shared among the antitrust bar notwithstanding the Eighth Circuit's decision in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (1979), that there exists no right of contribution in cases brought under the antitrust laws at least absent some showing that a settlement entered into between a plaintiff and one of several defendants was a sham or otherwise not entered into in good faith.

Retroactive application of a contribution statute enacted by the Congress would in effect change the rules of the game with respect to these already completed transactions. Whatever issues of fairness and deterrence may underlie the consideration of this proposed legislation, I think most would agree that the primary element of fairness, at least with respect to commercial transactions, is that there be known and certain rules governing those transactions. As Lord Coke observed early in the seventeenth century, "The known certainty of the law is the safety of all."

The transactions with which we are dealing are not uncomplicated ones. They were entered into by businesses, almost without exception upon the advice of counsel, and generally by persons competent and indeed skilled in assessing risks and benefits according to the then known rules. Many of these transactions have subtle nuances, and each as proposed engendered certain reasonable expectations concerning its consequences. It is safe to say that greater unfairness would arise from this legislation if it were now to change the rules with respect to those already completed transactions, than if we were to have no new legislation at all.

I realize that a great deal of effort has gone into attempts to devise means to avoid the unfairness which is inherent in any retroactive application. One such suggestion would apply the principles of claim reduction to pending cases absent a showing of manifest injustice, and would further deny the courts any power to disturb existing settlement agreements. I am not sure what these limitations add to those already provided by the Constitution; indeed, the drafters of this compromise language seem to recognize that the Constitution prevents the application of new laws to pre-existing facts and to pending litigation where manifest injustice would result.

But the fact remains that any retroactive application of this legislation would create additional and unnecessary uncertainty as to the already substantial risks presented by the antitrust laws. Actions in pending cases frequently have been taken to reduce these substantial risks to exposure of manageable and more certain proportions. Facts in those cases are now fixed and interests largely frozen. No one can conform his conduct to, or take action in light of, any particular new standard since the conduct at issue has already occurred.

Retroactive application and attempted limitations on retroactive application--given the already existing facts and pending litigation arising from them--will almost certainly provoke new litigation involving important interests which likely will not be resolved until lengthy court proceedings have run their course.

Let me turn now to a second area which seems to deserve the attention of the Congress in the event that a bill establishing a federal right of contribution is to be enacted. That issue is whether any federally established right of contribution should preempt state laws governing contribution insofar as they apply to facts which give rise to actions under the federal antitrust laws.

The problem is illustrated by a situation in which Conrail is involved and in a decision by Senior Judge William K. Thomas of the Northern District of Ohio, handed down on February 2.

In 1980, Conrail reached a settlement with a party threatening antitrust action against it. That plaintiff then sued a number of other railroads under both the federal antitrust laws and the antitrust laws of Ohio. These defendants sought to join Conrail as a third-party defendant, seeking contribution on both the federal and state claims. Judge Thomas rightly held under Texas Industries that no right of contribution exists on the federal claim, but went on to find that the Ohio Contribution Among Joint Tortfeasors statute was applicable with respect to the state claims.

To be sure, the Ohio joint tortfeasors statute precludes contribution against a defendant who has settled in "good faith". Judge Thomas, however, held the "good faith" of the settlement is a factual issue which is subject to discovery and conceivably must be resolved by a jury.

In addition, the Ohio mini-Sherman Act--the Valentine Act--explicitly provides that there is no time limitation within which an action for damages under it must be brought. Thus, although Conrail has endeavored to settle this case even before a complaint was filed, it now faces expensive and time-consuming litigation over the issue of the "good faith" of its settlement and the danger of contribution for acts committed by alleged co-conspirators as far back in 1956--a time when Conrail did not even exist and in which a much different legal atmosphere prevailed insofar as the regulation of rail transportation is concerned.

The principle of Judge Thomas' decision unfortunately is likely to give rise to a welter of conflicting judgments and rules of law. Since at least forty-seven States now have antitrust laws which prohibit to varying extents much of the conduct which is unlawful under the Sherman Act, and since thirty-nine States and the District of Columbia have rules of contribution in one form or another, the interaction of state antitrust laws and state contribution rules will not likely provide that mixture of fairness and deterrence which the

Congress is looking to achieve in its legislative consideration of the contribution question.

The likelihood of differing results on the contribution issue in differing forums may also give rist to additional litigation and to the type of forum shopping generally sought to be avoided where questions of national economic ploicy are involved.

We suggest, therefore, that any contribution statute which the Congress may ultimately pass provide also for uniform rules governing contribution in cases where state and federal antitrust claims arise out of essentially the same facts. This means, of course, that Congress should preempt the operation of state contribution laws in such cases.

This concludes my prepared statement. I shall be happy to attempt to answer any questions which the Chairman or the members of the Committee might have.

Statement of Henry L. King
Before the Senate Committee on the Judiciary
February 10, 1982

Mr. Chairman, my name is Henry L. King of the law firm of Davis Polk & Wardwell. Both my firm and I have had extensive experience in litigating antitrust price-fixing and class action cases over many years. We have represented International Paper Company in the Corrugated Container litigation. I appreciate very much the opportunity to appear before your Committee today.

Let me state at the outset that I, along with a great number of lawyers, companies and business groups, have supported legislation providing for contribution and claim reduction in antitrust cases, and specifically have urged adoption of S. 995 as introduced.

However, I believe there are compelling reasons why the Committee should not amend S. 995 to make it applicable, in whole or in part, to pending cases. I will attempt to outline these reasons briefly by discussing 1) historic and public policy arguments against such retroactivity, 2) the effects of retroactivity on pending cases, and 3) specific retroactivity proposals that have been suggested.

I. Historic and Public Policy Arguments Against Retroactivity.

Throughout our history as a nation we have had a strong aversion to ex post facto laws, that is, to laws which apply retroactively. In Federalist Paper No. 44, James Madison described retroactive laws as "contrary to the first principles of the social compact and to every principle of social legislation." The reason for this aversion to retroactivity is simple but compelling: citizens should be able to act with reasonable knowledge of legal consequences and expect reasonable stability in the rights and liabilities that attach to their acts or those of others. They should not be exposed to liabilities created after the fact.

Following Madison's principle, it has been the usual practice of the Congress when enacting new antitrust legislation which creates a new remedy or cause of action to give such legislation prospective effect only. This is particularly true where application of the legislation to pending cases might upset pre-existing settlement contracts that were entered into and court rulings that were made, all based upon the law obtaining at the time and upon which the court and parties legitimately relied. Thus, for example, when Congress enacted Section 304 of the parens patriae title of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, which increased the number of plaintiffs who could sue antitrust defendants, it specifically rejected an early draft which allowed application to suits "pending on the date of enactment," and provided that the new statute would not apply "to any injury sustained prior to date of enactment." Prospective application only was also provided when Congress enacted Section 4A of the Clayton Act, which authorized the United States to sue for single damages in its proprietary capacity. Similarly, the Antitrust Procedural Improvements Act of 1980, giving judicial discretion to award prejudgment interest in antitrust cases, applied prospectively only. S. 995, as introduced, reflects these sound principles.

In those few instances where retroactive antitrust legislation was enacted, it was done to reverse so-called "surprise" decisions by courts or the Federal Trade Commission which applied the antitrust laws in ways in which

Congress never intended and the parties never expected. This was the case with both the Newspaper Preservation Act and the Soft Drink Interbrand Competition Act. Never, as far as I have been able to determine, has the Congress granted retroactive effect to new antitrust legislation that would affect the rights of the parties in pending cases as profoundly as the retroactive amendments being proposed for S. 995.

According to the administrative office of the U.S. courts, there are some 2,800 antitrust cases currently pending, and many of these are horizontal price-fixing cases. There is no conceivable way for anyone to know how S. 995, if it were made applicable to such pending cases, might prejudice the many parties to such actions or how it might otherwise affect these cases. This much is clear, however: for every non-settling defendant who would be helped by retroactivity, there are many plaintiffs and many settling defendants as well who would be injured by it. Moreover, it is a virtual certainty that already complex litigation will become even more complex and the duration of these suits, many of which have already been in the courts for years, almost surely will be protracted.

Recognizing the policy and practical objections to retroactivity, the American Bar Association Section of Antitrust Law explicitly rejected a proposal to apply contribution legislation to pending cases. The Antitrust Section wrote:

> "The Task force originally proposed making the statute applicable at once to all pending and future actions. Numerous comments on that early draft, however, demonstrated a great concern, first that such a rule would upset settlement calculations already in progress, and second that parties could be prejudiced who had already participated in the conduct of joint defense efforts on an assumption

> of no contribution. Accordingly, our statutory proposal would apply only to proceedings initiated after its effective date."

II. Effects of Retroactivity on Pending Cases.

Several suggestions have been offered which would make S. 995 applicable in whole or in part to pending cases in which judgments for damages have been entered, or jury verdicts returned or settlements entered into. Such changes would raise serious constitutional due process questions; would change established legal precedent after substantial court activities have taken place in reliance on existing law; would create considerable uncertainty as to the status of numerous, large settlements that have been entered into in pending class action cases; and would result in delay, burden and expense in opening up new issues for litigation.

Let me briefly outline some of the specific ways in which active pending cases might be affected by retroactive application of S. 995:

o Retroactive application of the claim reduction provisions of S. 995 would result in the value of jury verdicts already rendered in favor of plaintiffs being reduced drastically. Such plaintiffs would thus be given the opportunity of litigating the constitutionality and basic fairness of what they would claim to be a deprivation of rights already vested.

o Similarly, serious uncertainty as to the status of settlements would be created by the retroactive application of the claim reduction provision of S. 995. Even if a provision is included that would purport to protect existing settlements, the plaintiff class might still contend that the claim reduction features of S. 995 interfered with or frustrated the settlement agreements. Plaintiffs could argue that they had refused to agree to any claim reduction of a settling defendant's sales as part of the settlement negotiations; in some instances they would contend that, on the contrary, it was specifically provided in the settlement agreements that plaintiff's full right to recover total damages would be preserved against non-settling defendants. Indeed, in the Corrugated Container litigation both the District Court and the Fifth Circuit Court of Appeals, in upholding the settlements, cited the plaintiffs' preservation of such a right. In his approval of the settlements, Judge Singleton stated:

> "Most important, these are partial settlements that specifically and explicitly preserved plaintiffs' right to litigate against all remaining defendants for the entire amount of plaintiffs' damages on the basis of joint and several liability for all of the injury caused by the conspiracy. The court considered this to be a valuable provision supporting the approval of the settlements. In effect, in each successive settlement, all the plaintiffs gave up was the right to recover that settlement amount against non-settling defendants." (emphasis in original)

In finally affirming Judge Singleton, the Fifth Circuit referred to this reservation by the plaintiff as one of the reasons for approving the settlement as fair and reasonable to the class. In Re Corrugated Container Antitrust Litigation, 659 F.2d. 1322, 1328 (5th Cir. 1981). Plaintiffs undoubtedly would argue that the Court, which has retained jurisdiction of the case, approved the settlement agreements on the understanding that the plaintiff class' right to claim full damages against non-settling defendants had been preserved and, this right having been frustrated, ask that the settlements be set aside.

The one defendant in Corrugated who declined to settle and submitted its case to the jury did so with full knowledge of those facts and the exposure it was thus facing if it lost. Against this history of settlement negotiations, settlement agreements, court approvals, and the concluded jury trial, for the Congress now to require claim reduction in such cases would affect substantially the value of jury verdicts obtained by the plaintiffs which in turn could raise questions as to the constitutionality of the legislation and the viability of the many settlements that had been reached.

- Efforts to upset the settlements would produce more protracted and expensive litigation. Initially there could be hearings to determine whether the settlements should be set aside. If settlements were overturned, the settling defendants either would try to settle the case again, with the required notice to hundreds of thousands of class members in some cases as well as court hearings on reasonableness, or they would go to trial, which could take many months. All of this would not only impose a heavy burden on the courts and parties but would delay for an extended period any payment to the class, numbering more than 200,000 companies. There is nothing in the law or policy considerations involved in this legislation which warrants such disruption, delay and uncertainty.

- The one defendant which went to trial in the Corrugated case did so in order to escape liability altogether, in the hope that it would win and not have to contribute anything to the fund that has accumulated for the benefit of the class. While others paid substantial millions, that one defendant gambled on paying nothing and lost. Under these circumstances, the settling defendants should not be exposed to any additional risk, uncertainty, or litigation expense.

Allowing S. 995 to apply to Corrugated would do just that. Retroactivity should be rejected in the interests of finality and fundamental fairness both to the thousands of businesses in the plaintiff class and to the many settling defendants who bought their peace.

o Many other companies and individuals not currently parties to the litigation would be affected by retroactive application of S. 995. In the Corrugated criminal prosecution, for example, the Department of Justice named 52 corporations as co-conspirators in a bill of particulars; 23 of these companies have not been named as defendants in the Corrugated treble damage complaints. Moreover, none of the 807 individuals named by the government as co-conspirators have been sued. If S. 995 were allowed to apply to pending cases, the one non-settling defendant would be in a position to name these 23 corporate co-conspirators and 807 individual co-conspirators as parties required to contribute to the judgment to be entered. This threat is not idle speculation. Indeed, that is precisely what happened last year in a California case related to Corrugated. In Esprit de Corp v. Alton Box Board Company, the Mead Corporation, acting under a Calfornia statute permitting contribution, filed a cross complaint designed to bring thousands of additional parties into the case. If a defendant has done this once, there is every reason to believe that, given an opportunity, it will do so again. It does not require much imagination to envision the procedural havoc such a practice would produce nor the tremendous burden it would impose on an already overburdened court system if it were allowed to apply to literally hundreds of antitrust cases currently pending in the federal courts.

Corrugated and other cases have been pending for many years and a great deal of litigation activity has already occurred. It simply does not make sense to allow additional parties to be brought in at this late stage, as the litigation is winding down. In short, the result of such retroactive application would be to make an already complex litigation enormously more complicated.

III. Specific Retroactivity Proposals.

Recognizing that an amendment to make S. 995 fully applicable to pending cases would be so objectionable as to face certain defeat, the proponents of retroactivity have put forth so-called "compromise" proposals, intended to defuse opposition. Upon close study, however, it is apparent that each of these is subject to the same objections as full retroactivity and creates additional problems, as well.

One such proposal would eliminate subdivision (e) of S. 995 so that the legislation would be silent as to the question of effective date. In the absence of a specific applicability clause, courts would have to determine in each pending case whether to apply the legislation. This in turn would depend upon each court's view of Congressional intent and of the nature of the legislation, and upon a decision whether it would be manifestly unjust to apply it to the case at hand. In short, the applicability question would have to be litigated separately in every case. It would take years before the question were authoritatively resolved, and only then could the courts begin to deal with such matters as the addition of defendants, reopening of the discovery, and the validity of settlements.

Moreover, there are likely to be inconsistent decisions among the many district and circuit courts in which the retroactivity matter is litigated, and ultimate resolution of the question is likely only by the Supreme Court after years of litigation and uncertainty.* And unlike other proposals, the deletion of (e) would leave the legislation without any language even purporting to protect settlements already reached. This increases the likelihood that settling defendants would find themselves drawn back into the cases when they thought they had bought their peace. All of this additional litigation and uncertainty will guarantee a substantial delay in the distribution of hundreds of millions of dollars and numerous settlements in class actions, while the contribution and claim reduction questions are litigated through the court system.

By allowing courts to apply provisions of S. 995 to pending cases, Congress would be abandoning its normal rule of not permitting new rights or causes of action to be applied in existing antitrust cases. The Supreme Court in the Texas Industries case held that it was for Congress and not the courts to act in the matter of contribution. Elimination of (e) would mean that Congress had failed to act on the critical point of determining the applicability of the new statute, and this would constitute a clear abdication of congressional responsibility rather than an exercise of it.

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* A determination of the constitutionality of legislation giving a statute retroactive application turns in part on whether the legislation is substantive or remedial. The Supreme Court last month dismissed for lack of a "substantial constitutional question" the appeal in Van Emmerik v. Janklow (50 U.S.L.W. 3546), in which the question was the constitutionality of a state statute which retroactively increased the sales tax on utility services. Justices White and Blackmun, dissenting, argued that a "substantial constitutional question" was presented and cited earlier cases which "appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." Application of this rule has spawned hundreds of cases in the federal courts.

Another proposal would make only the claim reduction provision of S. 995 retroactive and would attempt to preserve existing settlements. Not only is this proposal subject to the same constitutional and policy objections as all retroactive legislation, but it raises additional problems as well. Since the proposal is designed to reduce claims against non-settling defendants, plaintiffs would be denied the full recovery already won before juries. In Corrugated, for example, this proposal would cost the plaintiffs millions of dollars. In some cases, judgments entered under current law, but which are on appeal (e.g., the Plywood case), would have to be reduced retroactively. Thus, the due process problems are in no way avoided and would have to be litigated.

The distinguished constitutional scholar Charles Alan Wright of the University of Texas Law School has provided two written opinions in which he concludes that any retroactivity proposal would create severe due process problems, and would certainly produce much litigation. His opinion letters dated August 13, 1981 and December 18, 1981 are annexed hereto as Exhibits A and B. As Professor Wright pointed out in his August 13, 1981 letter (Ex. A, p. 5), S. 995 as introduced "is not intended in any way to reduce the recovery by those who are victims of an unlawful conspiracy." Yet that would be precisely the result of the proposed amendment to S. 995. It would protect those businesses found by a jury to have fixed prices, at the expense of the recoveries of those companies injured by the illegal conduct.

Moreover, the proposal, despite its intent to protect settlements, could nevertheless jeopardize them. As pointed out above, plaintiffs deprived of the full benefit of their jury victories could urge the court to reconsider approval of the settlements, which approval was based in part upon the assumption that the plaintiff class had preserved its right to seek the entire amount of its damages against the non-settling defendants. While we would oppose any attempt to rescind the settlement agreements, the proposed amendment to S. 995 creates the opportunity for challenges, with resultant burden and expense and exposure upon the settling defendants which long ago paid their money into court and thought they were finally terminating their litigation costs and risks.

Finally, because the draft attempts to circumvent constitutional problems by writing the standard of manifest injustice into the law, this standard will have to be litigated in every case. The burdens this additional litigation could impose on the court system are staggering.

Still other suggestions -- variants of the two approaches just discussed -- would either make the bill explicitly prospective with regard to contribution or eliminate the contribution provision altogether from S. 995, but in either case provide no guidance on the claim reduction feature. The most likely judicial interpretation of both proposals would, of course, be to apply claim reduction to pending cases, with all the disruption, additional litigation, and injustice that would entail. In addition, settlements would be jeopardized by the absence of language intended to protect them.

IV. Conclusion.

In summary, Mr. Chairman, virtually every proposal to apply provisions of S. 995, in whole or in part, to pending cases involves inequities imposed upon parties who relied upon existing law, additional burdens imposed upon the court system, and delays and uncertainties surrounding the final resolution. It is for these reasons that the Congress understandably has been very reluctant to enact new antitrust legislation on anything but a prospective basis. There is clearly no compelling reason why the Congress should depart from its normal rule in this instance, particularly where doing so would upset jury verdicts and settlements entered into in reliance on existing law. On the contrary, to do so with S. 995 would be to enact special interest legislation of the worst sort for a few non-settling defendants in a few horizontal price-fixing cases who deliberately decided to take their chances at trial and lost. There is absolutely no reason why the Congress should permit these defendants to achieve through legislation that which they failed thus far to achieve through the court system.

It should be clear to everyone that this issue of retroactivity would not even be before this Committee were it not for the fact that these few companies believe that they can get another "bite at the apple" through retroactive legislation. Indeed, when contribution was first considered by the Congress several years ago, the question of applying its provisions to pending cases was never raised. In 1979 the Senate Committee on the Judiciary passed an antitrust contribution bill with an identical provision to subdivision (e) in S. 995, calling for prospective application only. It was only after these non-settling defendants lost their cases at trial that the issue came before your Committee.

The companies now claim that they will be devastated financially without a retroactive amendment. I indeed have sympathy for their plight, but it is tempered by the knowledge that they have had every opportunity to settle their cases on the same basis as the other defendants which did in fact settle; in most if not all of these instances they still have opportunities to settle on bases that will not jeopardize their corporate existence. In some instances retroactivity does not solve the problem because of the extent of liability even with claim reduction. Here Congress is being asked to go against its principles of prospectivity to strengthen the position of one party in the settlement bargaining process.

While there is indeed congressional precedent for bailing out financially troubled companies, there is no precedent for doing so by making a mockery of our antitrust laws. By amending S. 995 to make it retroactive, the Congress would be sending precisely the wrong signal to horizontal price-fixers, among others: don't settle, gamble on a trial, and if you lose, don't worry because the Congress will take care of you. I don't believe that is the message this Committee wishes to convey. Therefore, I respectfully urge that S. 995 be enacted as introduced, with prospective effect only.

Thank you.

Appendix A

CHARLES ALAN WRIGHT
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AUSTIN 5, TEXAS

August 13, 1981

Ira M. Millstein, Esq.
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767 Fifth Avenue
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Henry L. King, Esq.
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Re: S. 995

Dear Messrs. Millstein and King:

At your request, I have looked into the constitutional issues that would be raised by proposed amendments to S. 995 to have it apply retroactively to pending cases. You have made available to me a number of views that have already been communicated to the Senate Judiciary Committee by interested parties, and I have done my own research into the law in this area.

There are three plausible constitutional objections to retroactive application of this legislation. It can be contended that it violates the separation of powers, that it impairs the obligations of contract, and that it is a denial of due process of law. The objection based on due process seems to me to raise a complex and uncertain issue. Adoption of this legislation with a retroactivity amendment would be a certain invitation to litigation raising due process claims, which litigation could hardly be authoritatively resolved short of the Supreme Court. The first two objections, however, in my judgment, are less compelling.

I will discuss in this letter only the due process objection since you asked me to focus on former Solicitor General Bork's letters to Senator Thurmond of June 8th and July 20, 1981, and those letters deal essentially with that issue.

I have great respect for former Solicitor General Bork. I have considered carefully his opinion (contained in his June 8th and July 20th letters) that it is "clear" that retroactivity is "entirely constitutional," and that "[n]o argument of serious constitutional merit can be raised" against retroactive application of the contribution legislation. I regret that my own study of the law in this area does not permit such a confident appraisal, and that what seems "clear" to General Bork seems fraught with doubt and uncertainty to me.

I am not helped by citation to the cases in which the broad power of Congress over "remedy" has been recognized. It is clearly the law today that there is no contribution in federal antitrust cases. Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S.Ct. 2061 (1981). In the view of many courts a contribution statute changes substantive rights, rather than merely a remedy, and for just that reason cannot be applied retroactively. Wesolowski v. Rhoades, 416 F. Supp. 1052, 1053 (E.D. Pa. 1976); Fraley v. Worthington, 64 F.R.D. 726, 728 (D. Wyo. 1974); United States Fidelity & Guaranty Co. v. Park City Corp., 397 F. Supp. 411, 414-415 (D. Ore. 1973), affirmed 526 F.2d 1120 (9th Cir. 1975); Massey v. Sullivan County, 464 S.W.2d 548, 549 (Tenn. 1971).

But even if there are cases to the contrary, that hardly is decisive. Names such as "right" and "remedy" are merely "conclusory legalisms." Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Nw. U. L. Rev. 540 (1956). Another commentator says that "the right-remedy dichotomy is conclusory only, and therefore of little use in deciding a particular case * * *." Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 711 n. 106 (1960).

Neither am I persuaded that cases raising issues of retroactivity are fungible and can be lumped together without regard to the kind of legislation that was involved. I agree with the authors who have said that

> the cases where retroactive legislation is an issue fall into four main categories and the Court appears to treat each category differently. The four categories of cases involving retroactive legislation under the Due Process Clause are: (1) cases that involve emergency retroactive legislation; (2) cases that challenge the constitutionality of curative statutes; (3) cases that involve the constitutional merits of retrospective taxing legislation; and

> (4) cases that contest the constitutionality of retrospective general legislation. Novak, Rotunda & Young, Constitutional Law 429 (1978).

The legislation now being considered falls into the fourth of these categories, and cases from the first three categories are of very little assistance.

Congress does not have plenary authority to adopt retrospective general legislation. "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976). In considering whether retroactive application of a law "would result in manifest injustice," courts must consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711, 717 (1974).

Suppose that a class of plaintiffs, P, has suffered $30 million in damages from an arguably illegal price-fixing conspiracy between SD and NS. SD has two-thirds of the market and NS has one-third. Neither defendant believes it has violated the law. SD, however, settles with P for $25 million, preferring to pay that amount rather than being subjected to possible liability for all of P's damages trebled, or $90 million. NS prefers to take its chances with a jury, and is found to be liable.

Under existing law the judgment against NS would be for $90 million, less the $25 million P has received in settlement, or $65 million. The result would be strikingly different if, at this point in the litigation, S. 995 should be adopted and should be made applicable to pending suits. It would limit the judgment against NS to $30 million.

The manifest injustice of this is apparent. P has been damaged in the amount of $30 million. A cornerstone of federal antitrust policy is that an injured person shall recover "three-fold the damages by him sustained." 15 U.S.C. § 15. Yet P will have obtained only $55 million, $30 million in the judgment against NS and $25 million in the settlement with SD. The purpose of S. 995 is to change the process by which the allocation of antitrust damages is determined. It is not intended in any way to reduce the recovery by those who are victims of an unlawful conspiracy. This will be of scant comfort to P, who has ended up with $35 million less than it otherwise would have.

It has been said that "in very general terms the two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter." Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 727 (1960). The public interest reflected in S. 995 as it was introduced is a strong one. It will allocate damages in a fairer manner among the parties to a price-fixing conspiracy without lessening the rights of injured persons. To amend the bill to apply it to pending suits such as the one hypothesized is contrary to the public interest in that it gives a $35 million windfall to the convicted price-fixer, NS, at the expense of P, the victim of the conspiracy. The public interest that the bill generally serves is weakened to the point of nonexistence, and the result is extremely unfair to P, who has relied on the existing law in settling with SD. Unlike Chase Securities Corp. v. Donaldson, 325 U.S. 304, 316 (1945), in this instance P's "conduct would have been different if the present rule had been known and the change foreseen." The amount for which P would settle with SD would be greatly different if P could have known that a change of law would defeat his right to collect the balance of his treble damages from NS.

Nor would it be fair to seek to avoid the injustice to P by providing that the change in law is reason for setting aside P's settlement with SD. As Judge Singleton observed in In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cases ¶ 62,689, at p. 77,880 (S.D. Tex. 1979):

> It seems unfair to all parties to change the rule underlying settlement in so complex a case at this stage of the litigation. Settling defendants have paid three hundred million dollars to buy their peace. Almost a

> year has passed since the first settlement agreement was reached. The settling defendants, under the terms of their settlements, have been cooperating with class plaintiffs in their discovery.

To take away from SD the protection of a settlement it negotiated in good faith and for which it has paid $25 million, and to force it to a trial in which it may be disadvantaged because of its cooperation with P in discovery, would seem to many to be manifest injustice to SD. The Corrugated Container cases produced litigation that the Fifth Circuit properly characterized as "gargantuan." In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 960 (5th Cir. 1980). In matters of such dimension settlement should be encouraged, not penalized.

As the example shows, the result of applying S. 995 to pending suits would be to give $35 million to NS at the expense either of P or, if the settlement would be reopened and SD held liable, of SD. That the courts would allow such a result, in the absence of compelling public interest to justify it, is doubtful in the extreme. In any event, it would certainly produce much litigation.

Sincerely,

Charles Alan Wright

Charles Alan Wright

Appendix B

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December 18, 1981

Mr. Henry L. King, Esq.
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Dear Mr. King:

On August 13, 1981, I gave you and Ira M. Millstein, Esq., my opinion on the constitutional issues raised by proposed amendments to S. 995 to have it apply retroactively to pending cases. My conclusion was that the due process objection to retroactive application of S. 995 raised a complex and uncertain issue that would certainly produce much litigation.

On October 29th of this year the Fifth Circuit decided four cases, In re Corrugated Container Litigation, in which the approval of settlements between the plaintiffs and some of the defendants in the Corrugated Container cases by the district court was affirmed. You have asked if this alters my view of the constitutional questions raised by retroactive application of S. 995.

In my judgment the constitutional issues that concerned me, and that I described in my letter of August 13th, are not altered by the fact of appellate approval of the settlements in these cases. In my earlier letter I put an example in which a class of plaintiffs, P, has suffered $30 million in damages from an arguably illegal price-fixing conspiracy between SD and NS. SD, which had two-thirds of the market, settles with P for $25 million, while NS, with the remaining one-third of the market, refuses to settle and is found liable by a jury.

I pointed out that under existing law the judgment against NS would be for $90 million, less the $25 million P had received in settlement, or $65 million. If S. 995 were adopted and made applicable to pending suits, it would limit the judgment against NS to $30 million.

This would mean one of two things. Either P would end up with a total of only $55 million, far less than the treble damages to which federal antitrust law has given antitrust victims a right, or that P would argue that the settlement between P and SD ought to be set aside so that P might seek to obtain its full damages against SD. The result of making S. 995 retroactive, I said, "would be to give $35 million to NS at the expense either of P or, if the settlement would be reopened and SD held liable, of SD. That the courts would allow such a result, in the absence of compelling public interest to justify it, is doubtful in the extreme. In any event, it would certainly produce much litigation."

That analysis is not altered in any important way by the fact that in the Corrugated Container cases settlements with some defendants -- the hypothetical SD -- have now received appellate approval. Indeed if the result of retroactive application of S. 995 were to deprive my hypothetical P of $35 million, the constitutional issue is not changed at all. Final court approval of the settlement makes reopening the settlement somewhat more difficult, but not significantly so, particularly if, as the constitutional analysis presupposes, a court would think it a manifest injustice if P were to end up with less than the full treble damages to which it is now entitled.

The premise on which the settlements were made by the parties and approved by the courts in the Corrugated Container litigation is that plaintiffs reserved their right to go against nonsettling defendants for full damages, less only the amounts received in settlement. In re Corrugated Container Antitrust Litigation, 5th Cir., October 29, 1981, Nos. 80-1103, 80-1018, slip op. at 12655. When approval of the settlements was first before the Fifth Circuit, it recognized that the settling defendants might have recourse to a rescission action if it were held that the nonsettling defendant, Mead, had a right of contribution against the settling defendants. In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 224-225 (5th Cir. 1981). In its more recent decision the Fifth Circuit held that "this obstacle to the implementation of the settlement agreements has been effectively removed" by the Supreme Court's decision last Term that a federal antitrust defendant has no right to contribution from his co-conspirators. Slip op. at 12657. But if Mead were to be given by statute a right of claim reduction, so that plaintiffs no longer could collect from Mead their full treble damages, less the amounts paid by the other defendants in settlement, plaintiffs would surely be before the court arguing that the settlements must be reopened. This is an argument that the courts, which act as a fiduciary for absent members of a class in approving settlements, could not lightly reject.

That the settlements would in fact be reopened if the law were to be changed in this respect cannot be said. That under these circumstances there would be fair ground for litigation cannot be gainsaid.

Rule 60(b)(1) was amended in 1948 by dropping the limiting pronoun "his" in order to allow relief from a judgment because of the mistake or neglect of persons other than the moving party. 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2858 (1973). Here it could well be argued that the parties in agreeing to settlements and the two courts that have approved those settlements had all been proceeding on the basis of a mistake of law if Congress should change the recovery possible from Mead. Cf. *Florida* v. *Treasure Salvors, Inc.*, 621 F.2d 1340, 1349 (5th Cir. 1980), certiorari granted on other issues 101 S.Ct. 2312 (1981). Relief has been granted under Rule 60 (b)(1) from a consent judgment that had been agreed to on a misunderstanding about the legal rights of the other party. *United States* v. *Gould*, 301 F.2d 353 (5th Cir. 1962).

Rule 60(b)(5), allowing relief if it is no longer equitable that a judgment should have prospective application, is not usually thought to apply to a judgment for money damages for a past wrong. *Ryan* v. *United States Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962). Even this is by no means certain, however. See *Bros. Inc.* v. *W. E. Grace Mfg. Co.*, 320 F.2d 592, 610 (5th Cir. 1963). Rule 60(b)(5) cannot be limited to injunctions nor even to relief that historically would have been granted only in courts of equity. 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2863 at 205 (1973).

The power of a court to modify its judgment does not depend on whether the judgment was entered after litigation or by consent. *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932); *System Federation No. 91* v. *Wright*, 364 U.S. 642, 646 (1961). As Justice Harlan wrote in the *System Federation* case:

> Fequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended.

364 U.S. at 651. If the words "Clayton Act" are substituted for "Railway Labor Act," that passage is very closely in point. In approving settlements the Fifth Circuit was required to decide whether they were fair to absent members of the class of plaintiffs and consistent with the objectives of the Clayton Act. If the federal antitrust laws are changed, the court will have to consider whether enforcement of the settlements remains consistent with the objectives of the statute as amended.

This is not to say that plaintiffs could successfully upset the settlements in the Corrugated Container cases if S. 995 should be passed and made retroactive. Indeed one draft of a retroactivity provision I have seen would purport to bar rescission of prior settlements, but it in turn would make the claim reduction feature not applicable if it would be "manifestly unjust" to apply it, and thus would make the constitutional issue on retroactivity an issue under the proposed statute. All that can be said with great assurance is that any attempt to make the principles of contribution or of claim reduction applicable to a case such as the Corrugated Container litigation in which settlements have been agreed to and approved by the courts would raise serious constitutional issues, would cast a cloud over the existing settlements, and would produce lengthy and uncertain ligitation.

Sincerely,

Charles Alan Wright

STATEMENT OF DAVID L. FOSTER
IN OPPOSITION TO PROPOSALS TO
AMEND S.995 TO PROVIDE FOR RETROACTIVE APPLICATION

I am DAVID L. FOSTER, a member of the law firm of WILLKIE FARR & GALLAGHER of New York City.

My interest in the matters before this Committee, and in antitrust law generally, is substantial. I am a member of the Council of the American Bar Association's Antitrust Section. I have spent much of my professional life on antitrust matters and have tried antitrust cases on behalf of plaintiffs as well as defendants.

Before making my presentation I point out that I am currently representing Burlington Industries, Inc. ("Burlington") which is a plaintiff in a pending antitrust litigation against Milliken & Co. ("Milliken") and others. Burlington has been awarded a judgment in the neighborhood of $21,000,000 by the United States District Court for the District of South Carolina as a result of adjudicated antitrust violations by Milliken and its co-conspirators which involve, inter alia, price-fixing, and which both the trial and appellate courts have already determined caused injury to Burlington. The amount of Burlington's judgment is presently on appeal. In the meanwhile, however, despite judicial decisions adjudicating Burlington the victim of hard-core antitrust violations, that judgment stands to be reduced by legislative act to less than half the amount awarded by the court if S.995 is amended to provide for retroactive application to pending cases.

In this statement, I address solely the question whether S.995, which states that it is to apply only to actions commenced after its enactment, should be amended so that the substantial changes in the antitrust laws which the bill contemplates would apply retroactively to pending cases. A handful of companies have been pushing strongly for such an amendment. Their efforts are motivated entirely by self-interest for they are all adjudicated price fixers who are seeking a Congressional "bail-out" to relieve them of substantial judgments. If S.995 is so amended, it will be transformed into a most blatant form of special interest legislation. I believe that any effort to make S.995 applicable other than prospectively should be firmly rejected by the Committee.

1. The Few Proponents of Retroactivity Are Motivated Solely by Self-Interest; They Are Adjudicated Price-Fixers Whose Cause Is Unworthy of Support

S.995, if enacted, would effect a major substantive change in the antitrust laws. Currently, defendants in antitrust suits have no right of contribution against their co-conspirators or co-defendants. That long-standing rule was re-affirmed in May of last year by the United States Supreme Court.[1] In that decision, the Court ruled that any change in the rule against contribution could not come from the courts but, since the question was fraught with important policy considerations, could only be resolved by the Congress.

S.995 would bring about that change. It would permit defendants or co-conspirators in price fixing cases to assert contribution claims against each other with respect to any judgment that may be obtained by the plaintiff. S.995 would also change the law applicable to settlements in such cases. The current law, which had been unquestioned for years and which reflects the underlying nature of antitrust liability in which each conspirator is liable for the total damages caused by the entire conspiracy,[2] provides that only amounts actually paid in settlement of an antitrust claim are deducted from the plaintiff's ultimate treble damage judgment against non-settling defendants.[3] In other words, a plaintiff who settles with some defendants retains the right to recover the balance of its total damages against the remaining defendants. S.995 changes that long established rule of law by instituting a rule of claim reduction. Claim reduction would operate to reduce the damages a plaintiff can recover at trial from the non-settling defendants by the amount of damages attributable to the settling defendants. A portion of the plaintiff's claim would be extinguished when he settles with a defendant in order to spare that defendant (who has settled to avoid litigation expense and risk) from claims of contribution from non-settling defendants.

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[1] Texas Industries, Inc. v. Radcliff Materials, Inc., 449 U.S. 949 (1981).

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[2] This traditional concept of antitrust liability is not some fundamentally unfair aberration, as Milliken and its allies have argued. Its rationale was perhaps best explained by Mr. Justice White in his concurring opinion in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 144 (1968):

> Those [antitrust] damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the reach of § 1 of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages sufficient to permit a third party to recover.

[3] Hydrolevel Corp. v. ASME, Inc., 635 F.2d 118 (2d Cir. 1980); Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), cert. denied, 355 U.S. 835 (1957); See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

If S.995 is prospective only, a plaintiff who settles hereafter will do so with fair warning as to that which it is giving up and can negotiate accordingly. Future settlements will be worked out in light of the claim reduction rule for which the legislation provides. Such settlements may differ from those made in the past since the parties will know that the plaintiff will no longer preserve its rights to a full treble damage recovery against the non-settling defendants but will instead be giving up a perhaps still uncertain portion of its total claim; but they will at least be reached on the basis of honest negotiation and a full appreciation of the applicable rules.

On the other hand, the vice of retroactivity is plain and its unfairness is substantial: If a partial settlement has already occurred, the claim against the remaining defendants will be reduced by a far larger amount than the settling plaintiff anticipated on the basis of the law as it existed at the time that plaintiff in good faith negotiated and signed the agreement to settle. Retroactivity will thus contravene one of the basic principles of our legal system -- that one should be able to assess his conduct with reasonable certainty of the legal consequences.

The primary proponents of retroactivity for S.995 have been Mead Corporation, Georgia-Pacific Corporation and Milliken & Co. (plus a handful of apparent allies). Each of the foregoing advocates of retroactivity is a defendant in a major, presently pending, antitrust suit; each has already been found liable for antitrust violations by reason of price fixing activities; and each is seeking to be relieved of the consequences of its conduct by retroactive application of S.995. Each would have Congress grant it a windfall -- at the expense of its victims -- which each never expected and which each certainly does not deserve.

We need not reiterate at this time the now-familiar story of Mead and the Corrugated Container litigation, although it must be recalled that Mead chose to litigate despite many opportunities to settle, that a settlement is apparently still available, and that Mead's protestations of a threat to its existence are belied by its own reports to its shareholders that no materially adverse effects on its financial condition are anticipated as a result of the litigation.

The position of Georgia-Pacific in the Plywood litigation is similar. Along with two other defendants (who are also urging retroactivity), Georgia-Pacific passed up a chance to settle, took its chances by going to trial and lost. Like Mead, Georgia-Pacific has emphasized its huge, potentially crippling, exposure in its lobbying efforts, but in its 1981 Report to Shareholders has told its shareholders an entirely different story.

The position of Milliken & Co. does require further discussion, because it has received less publicity and because the merits of Milliken's position have been confusingly misstated by its advocates.[4] Burlington's litigation against Milliken dates back to 1969 when Burlington stopped paying Milliken royalties on certain allegedly patented textile machines. Burlington was sued by Milliken and, in turn, filed antitrust counterclaims against Milliken and others. In 1977, after a trial lasting nine months, the court ruled that each of the patents under which Burlington had been licensed was invalid and/or non-infringed and that Milliken had conspired with its primary competitor to stabilize and maintain the royalties which had been imposed on Burlington both by Milliken and by the competitor pursuant to a parallel and interdependant licensing program. Duplan Corporation, et al. v. Deering Milliken, Inc., 444 F. Supp. 648 (D.S.C. 1977), aff'd in part, rev'd in part, 594 F.2d 979 (4th Cir. 1979), cert. denied, 444 U.S. 1015 (1980). In short, Milliken was found to have engaged in price fixing.

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[4] As part of their efforts in support of a retroactive Congressional bail-out for their clients, spokesman for Georgia-Pacific and Milliken have circulated a "Statement," dated July 13, 1981, which attempts to demonstrate that Burlington is somehow "unworthy" of the judgment it has obtained against Milliken. The attack on Burlington, however, is grossly inaccurate in its characterizations of Burlington's conduct and the Burlington v. Milliken litigation. Plainly, however, this is not the appropriate forum to debate Milliken's charges; whether the district court was correct in rejecting them is now before the court of appeals. Since Milliken has chosen to air its phony accusations in submissions to members of this Committee, however, I have annexed as an Addendum hereto a few brief comments by way of rebuttal.

The evidence of Milliken's wrongdoing was overwhelming. There was, for example, direct evidence of communications between the competitors in which they discussed their mutual interest in preserving their respective royalty programs. These communications progressed through an "agreement in principle" that the royalties were a single pot which the competitors should share, and culminated in joint action which the court found had as its effect and specific purpose the agreed perpetuation of the respective royalty programs and the stabilization of the royalty rates thereunder. The evidence included a transcript of a telephone conversation in which the competitors expressly discussed that one side would have no reason to reduce its royalties unless forced to do so by the other. The underlying tenet of their discussions was expressed in writing by one of the conspirators: "Everything to settle so that all competitors [charge] a royalty." See 444 F. Supp. at 679. The evidence was analyzed at length in the trial court's opinion holding

Milliken liable; that analysis was expressly endorsed by the court of appeals which stated, in affirming Milliken's liability in a per curiam opinion issued six weeks after oral argument:

> Judge Dupree's opinion...is admirably comprehensive in its detail of the facts and its discussion of the proof, and the inferences drawn from these premises are warranted and fair. So thorough, explicit and sound is the opinion that we are satisfied to affirm to decision of the district court upon Judge Dupree's opinion.... (594 F.2d at 981).

In 1974 Burlington settled with one of Milliken's co-conspirators. Milliken disdainfully passed up similar opportunities to settle on comparable terms. Milliken freely went to trial with full knowledge of the potential consequences under existing law -- that if found guilty it would be liable for three times the damages sustained by plaintiffs as a result of the entire conspiracy (less only amounts actually paid by co-conspirators in settlement) and not just damages attributable to its own royalty collections. Thus, Milliken gambled in an effort to escape liability altogether; however, it lost and was found liable; that liability was affirmed on appeal; the Supreme Court denied review; and after a subsequent trial on amount of damages, Burlington, which paid the fixed royalties, was awarded a treble damage award against Milliken of almost $21,000,000, a substantial component of which -- consistent with existing law -- consists of damages relating to transactions between Burlington and Milliken's co-conspirator.

Burlington secured that judgment, now on appeal, after twelve arduous years of litigation -- years during which Burlington, given the existing rules against contribution and governing settlements in antitrust litigation, had every right to expect it was a judgment to which it was entitled under section 4 of the Clayton Act which provides for recovery of "threefold the damages ... sustained." Retroactive reversal of existing law, however, threatens a reduction in that judgment by more than one-half. Retroactive application of S.995 will deprive Burlington of the fruits of its victory in a bitterly contested suit in which it invested millions of dollars in executive time and cash outlays to vindicate its rights. Milliken, having lost, will have succeeded in getting the rules changed after the game is over because it did not like the outcome.

Although the Burlington judgment is substantial, Milliken has not contended and could not honestly contend that it will be placed in financial jeopardy by paying the full amount found due. Furthermore, since Milliken and the other defendants enjoyed their ill-gotten gains for twelve to sixteen years during a period of high inflation and declining money value, such a reduction in Burlington's recovery will leave defendants with a substantial net profit from their illegal activity, and Burlington with far less than a fairly compensating recovery. Indeed, even the $21,000,000 judgment will not, in today's inflated dollars, fully compensate Burlington in terms of the statutorily mandated treble damages based on the millions of dollars in fixed royalty payments it made years ago to Milliken alone (not to mention the payments to the co-conspirator).[5]

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[5] In 1980, Congress recognized the erosive effect of the combination of inflation and delay on even treble damages recoveries. In the Antitrust Procedural Improvements Act of 1980 it provided for judicial discretion to award pre-judgment interest in antitrust cases --an award which would have been appropriate in the Burlington-Milliken litigation. Congress, however, explicitly provided that that Act would not apply to pending cases -- i.e., that it would be prospective only.

2. Retroactivity Will Upset Rights Established in Good Faith Reliance on Settled Law, Create Great Uncertainty and Spawn Unproductive Litigation.

In our Anglo-American system of jurisprudence, predictability of result has long been recognized to be of overriding importance in legal principles affecting commerce. Today especially, businesses exist in a tangled web of laws, regulations and contractual relationships, through which they move with the guidance of skilled legal counsel, the accuracy of whose advice is dependent upon stable legal rules and principles. If changes in the law are made prospectively, those affected will at least know the rules, potential risks and legal consequences in advance and can plan their conduct accordingly, but retroactivity typically does great harm in changing the rules after-the-fact and thereby upsetting expectations upon which action has already been taken.

In the contribution/claim reduction setting, providing for retroactivity would assist at most a handful of undeserving companies at the expense of undermining the rights of a considerably larger number of companies and other litigants whose rights are established under settlement contracts entered into in reliance upon existing law (and at least in Burlington's case under a duly awarded judgment in a court of law).

In the Corrugated Container litigation, for example, more than thirty large corporations, elected to settle with plaintiffs. They did so seemingly secure in the knowledge that they were putting the litigation and its attendant exposure behind them. Under existing law, they understood that they were free of claims for contribution by any non-settling defendant, such as Mead. On the other side of the litigation, the plaintiffs agreed to settlements seemingly secure in the knowledge that they retained the right to recover their full trebled damages, less only actual settlement payments, from any non-settling defendants.[6] In addition, the court in Corrugated Container, in approving the settlements for fairness (as is required in all class actions), took note that plaintiffs had reserved their rights to recover in full from the non-settling defendants the remainder of the damages caused by the entire conspiracy. The Supreme Court in its Texas Industries decision of May 1981 re-affirmed that both sides, and the court, were correct in their perceptions.

If Congress were now to decide to apply contribution and claim reduction to pending litigation, the results will be disastrous both in terms of the destruction of substantive rights and the ensuing procedural chaos and uncertainty. Plaintiffs confronted with a rule of claim reduction (which drastically and retroactively reduces their claims against non-settling defendants) will seek to re-open approved settlements or avoid approval of settlements previously agreed upon. Defendants who had been adjudged liable on the basis of existing law will seek to re-open judgments. Defendants who settled previously will be enmeshed in proceedings to defend their settlements, and if those settlements are set aside, will find themselves back in court litigating lost cases, denied the benefits of the settlements they wisely negotiated.

With all deference to the members of the Committee, I submit that no genius at draftsmanship can formulate a retroactive bill to avoid such a morass of proceedings to re-open or overturn settlements and judgments. The constitutionality of retroactive application of claim reduction and contribution to settled rights will be attacked. The constitutional questions inherent in any attempted retroactivity for S.995 have been identified by both sides. Learned opinions, reaching opposite conclusions, have been disseminated by the different camps. The situation can accurately be summarized by saying that retroactivity raises serious constitutional issues.

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[6] Burlington is in a similar position. It settled with Milliken's co-conspirator in 1974 in the expectation that it was free to pursue the remainder of its damage claim against Milliken. Indeed, in accordance with established law (Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 342-48 (1971)), its rights against Milliken were expressly reserved in the settlement papers.

A Supreme Court ruling -- or a series of Supreme Court rulings -- would undoubtedly be required to resolve the constitutional and other questions raised by the retroactive imposition of rules of claim reduction and contribution. The cost would be enormous: lawyers' fees, costs of litigation, unproductive management time, etc. Thousands or tens of thousands of litigants would be adversely affected -- all to assist a handful of companies who made bad judgments to litigate and not to settle cheaply when they could have.

3. Attempts to Devise a "Compromise" Proposal Have Failed; Compromise on the Issue of Retroactivity Is Impossible in Light of the Extreme Demands of the Companies Seeking Retroactive Relief.

Over the past several months efforts have from time to time been made to forge a so-called "compromise" proposal which could be put forth by the business community to reconcile the opposing positions of the many corporations which favor prospective legislation and the handful of concerns which are agitating for a retroactive bail-out. The proposals which have been circulated hardly constitute a "compromise."[7] They only exacerbate the inequities of retroactivity, may spawn even more litigation, and are subject to attack as even ranker forms of special interest legislation. Simply stated, such proposals attempt to answer the objections of settling defendants by providing that contribution shall be prospective only and that settlements cannot be re-opened or overturned. They provide, however, for retroactive claim reduction. Since retroactive application of S.995 necessarily frustrates the expectations of plaintiffs while preserving those of defendants, the heavy handed efforts to nail down existing settlements against the attack of outraged plaintiffs would subject the bill to the criticism that it is guaranteed not to do anything retroactively unless it can do something harmful to plaintiffs.

Logically, a bill making changes in the law applicable to contribution, settlement and claim reduction should have symmetrical application. S.995 makes settlement and contribution prospective only for a powerful reason -- to avoid frustrating the expectations of defendants who have elected to buy peace at an often heavy price. But retroactive claim reduction totally frustrates the expectations of settling plaintiffs, although no rational reason has been or can be advanced why the expectations of plaintiffs (especially those in whose favor courts have already ruled) are less worthy of preservation than those of defendants. Since the so-called compromise proposals are designed to insure that this disparity between plaintiffs and defendants will be preserved, there can be no answer to the criticism which will be advanced that an unfair and arbitrary decision will have been made to protect defendants at the absolute expense of plaintiffs -- plaintiffs who have already been victimized by anti-competitive conduct.

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[7] The main proposals have been circulated ostensibly under the aegis of the Business Roundtable. In reality, I understand that they have not been formally commissioned or endorsed by that organization's Antitrust Task Force or any of its other committees. On August 21, 1981, the Lawyer's Advisory Committee of the Roundtable reached a consensus that the Roundtable's prior endorsement of a prospective bill should be fully supported.

The deletion of subparagraph (e) of S.995 without substituting additional language is also an unrealistic alternative. To the extent that such an approach is urged by the advocates of retroactivity, it is plain that they believe that such deletion would provide a "legislative history" tantamount to expressed retroactivity.[8] If the courts ultimately reached that conclusion, all of the vices of expressed retroactivity would, of course, apply. Furthermore, it must be emphasized that deletion of subparagraph (e) would not itself provide judicial flexibility to apply the statute or not on the basis of the perceived "equities" of a particular case. The ultimate interpretation of the statute as prospective or retroactive, when eventually made by the Supreme Court, would apply to all cases. If in the interim differing results were reached in different cases, that difference would reflect not flexibility but rather an undesirable uncertainty as to Congressional intent.

It is now clear that efforts to arrive at a so-called compromise on retroactivity have failed. I submit that there is no feasible compromise on the issue of retroactivity which will protect the rights of all litigants in pending cases who have already taken action

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[8] *See*, *e.g.*, *Bradley* v. *Richmond School Bd*., 416 U.S. 696, 716 (1973); *Tennessee Valley Auth*. v. *Hill*, 437 U.S. 153 (1978); *Yakim* v. *Califano*, 587 F.2d 149, 150 (3d Cir. 1978).

-- either by settling or proceeding to judgment -- in reliance upon existing law.

Conclusion

In leaving the question of contribution in antitrust cases for Congress to resolve, the Supreme Court noted that the policy questions involved were "far reaching." Whatever policy considerations might prompt individual members of the Committee to support S.995, there are no such considerations which dictate the upheaval of substantive rights and the imposition of procedural havoc which would be the legacy of a retroactive bill.

Retroactivity furthers no overriding public policy; it will further only the narrow special interests of a few adjudicated antitrust violators. To bail out the few to the detriment of the many -- particularly in light of the serious legal uncertainties and the attendant costs in resolving them -- would be special interest legislation of the worst kind. A retroactive bill could be construed as vindicating a statement -- drawn from the record of the Burlington litigation against Milliken -- of the Milliken executive primarily involved in the price fixing activity for which Burlington was awarded its judgment. He said:

> [I]t is a fact of life here that no one imputes any dishonesty to a corporation for breaking the anti-trust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly. (See 444 F. Supp. at 705 n.45).

Needless to say, such cynicism does not accord with my views, Burlington's views, those of the overwhelming majority of businessmen or those of this Committee. If policy considerations point to the desirability of a change in our antitrust laws, such change should apply solely to future conduct; it should not retroactively readjust rights and equities arising out of past actions, especially when such readjustment cynically takes from the victim and gives to the wrongdoer -- an objective which cannot be justified by any rational policy.

The clear prospective-only mandate of S.995 should be preserved without qualification.

ADDENDUM REGARDING MILLIKEN'S JULY 13, 1981 STATEMENT

The allegation that Burlington was involved in the illegal conspiracy involving Milliken and its competitor Leesona Corporation ("Leesona"), was an afterthought in the Milliken litigation, first raised by Milliken after Milliken's liability was adjudicated. Indeed, prior to and during the liability trial, it was Milliken's position that Burlington's conduct had been free of any wrongdoing, and that its own conduct, which it claimed to be similar to that of Burlington, should also be deemed innocent. When the failure of that ploy was rendered irrevocable by the confirmation beyond further appeal of the liability judgment, Milliken reversed its position and moved to amend its pleadings to state claims and defenses against Burlington based upon the same allegations now contained in Milliken's "Statement." That motion was denied. Earlier attempts by Milliken's co-conspirator Leesona to assert the same charges were also unsuccessful.

In sum, the distorted charges against Burlington now made in Congress were raised on several different occasions during the course of the twelve years of litigation between Burlington and Milliken and Leesona, in various federal courts, and have not been accepted by any of those courts. These charges were made in desperation. At their core, they attempted to brand as wrongful the efforts of Burlington to minimize the royalties exacted by the unlawful schemes of Milliken and Leesona, and hence its damages. Burlington was successful in reducing somewhat the illegal royalties inflicted upon it, but the bulk of the royalty burden remained upon Burlington throughout the period of the conspiracy. Burlington's damages were measured by the net royalties which it paid (after damages were mitigated by the amount of the royalties which were refunded to Burlington by one of the co-conspirators), and its judgment is accordingly not overstated by one penny (In fact, the net royalties were stipulated by Milliken). Furthermore, the charge has never been and could never be made that Burlington shared in any way in illegal royalties exacted by Milliken and Leesona from others. The basic proposition advanced unsuccessfully in the litigation by Milliken and Leesona, and now pressed upon the Congress -- that the target of a price fixing conspiracy becomes by perverted reasoning a conspirator rather than a victim when it minimizes somewhat its damages -- is unworthy of the distinguished advocates who have asserted such a position.

More fundamentally, the measure of the position of the advocates of retroactivity is revealed by the repetition of this unsuccessful defense in this legislative forum. Surely the decision of the Committee on such a vital matter as the application of revolutionary legislation to tens of thousands of litigating parties cannot reasonably be informed by such a focus upon asserted inequities in a single case. The effect of retroactivity upon individual parties may be significant insofar as those parties correctly symbolize litigants generally, but the attempt to treat this Committee as simply a further step in Milliken's appellate process is both inappropriate and demeaning.

The **Chairman**. Would the other gentlemen on this panel come back up—Senator Tydings, Mr. Susman, and Mr. Kohn?

In reaching settlement agreements with any individual defendant, do you think it is appropriate to negotiate a less-than-satisfactory settlement from that particular defendant on the grounds that the plaintiff can make up the difference from a nonsettling defendant in the future?

Mr. **Susman**. Yes, sir. What is a satisfactory settlement under existing law depends on whether the remaining defendants are jointly and severally liable for all of the damage. There is no question about it, that joint and several liability puts a tremendous burden on the last defendant to settle. The plaintiffs' attorneys, representing their class properly, attempt to maximize the recovery.

There are certain settlements that, if they had been done in a different order at a different time, would have come out in a different way. So yes, sir, it is proper, and we do take small amounts from certain defendants at the beginning of a settlement process, and, as time goes, the amounts increase that you take in settlement, the point of all that being, certainly in the *Corrugated* case, Mead was offered an opportunity to buy out at every level.

It was not as if we had a vengeance against one or two defendants. They were offered an opportunity. Only some came forward, and then you do get more money as you go.

The **Chairman**. Senator Tydings, would you agree that under existing law the prevailing view is that, where a statute is silent, a court should apply that statute to pending cases absent some manifest injustice in doing so? And could this be construed as a bias by the court in favor of treating all parties alike at the time that they are judged?

Mr. **Tydings**. I am not certain if I understand your question, but there is a very strong precedent for the validity of statutes which are enacted by the Congress, but that validity relates primarily to prospectivity, and, absent an important national interest, such as settling a prospective war with France or something like that, the Supreme Court has consistently held that they are not going to interfere with the private rights of parties by approving retroactivity.

In the *Bradley School* case down in Richmond, which was cited here, that is where the language "manifest injustice" comes out—it comes out of that case—that case involved a situation where a district court had approved attorneys' fees for schoolchildren who had litigated their rights in the U.S. district court in Richmond. That district court had approved those attorneys' fees under the inherent equitable powers of the court in circumstances like that to provide attorneys' fees.

That case went up on appeal. The Fourth Circuit reversed it. At the same time it was going up on appeal, the Congress of the United States enacted legislation which provided for those attorneys' fees. The Supreme Court upheld the retroactive application of those attorneys' fees, but they pointed out the fact that the case had already been decided by the lower court based on a historic principle. That was a case involving very strong public interest—namely, to protect the rights of the schoolchildren to contest for their own rights with respect to the Richmond school system. But in cases from time immemorial the Supreme Court has not permitted just retroactive enactment of legislation short of compelling national reason.

The **Chairman**. Mr. Kohn, I have a question for you. Do you believe it is fundamentally fair for a defendant in an antitrust case to be forced to bear a substantially larger damage burden in the harm that the defendant was accused of causing the plaintiff simply because the defendant maintained that it wanted a chance to defend itself at trial?

Mr. **Kohn**. I do not think that any defendant that I know of that has gone to trial has had to pay a substantially higher burden than the damage he caused.

The law has been clear for several generations under the antitrust laws and for several hundred years before that, that tort-feasors who intentionally cause harm to other people are jointly and severally liable for the entire harm. So that when you say "more harm than he caused," the question is being put in such a way that it is contrary to what the law has provided.

You could have sued at one time, and you still can today, one of the joint tort-feasors for the entire damage, because he intentionally caused it, and you do not have to fragment it based upon his particular contribution to the volume of merchandise sold.

The typical example is the so-called X Company that one of the prior witnesses referred to. X Company, he said, sold none of the merchandise, but X Company was a participant in the conspiracy. Does that mean that X Company is to be completely exonerated from liability or that its fair share is zero? There is no necessary relationship between the volume of merchandise sold or bought by a particular defendant and "causing the damage." The courts have been very careful to work this rule out over a long period, and they have held that you cannot recover twice for the same damage, and nobody gainsays that.

The problem is as to what goes into a reasonable settlement, and what goes into a reasonable settlement is as varied and complex as what goes into a decision to marry a particular person. You cannot isolate the factors as these people artificially are trying to do.

They could have come in just like everybody else; they chose not to, and they are asking you to bail them out, and there is no reason why that should be done, as Mr. King, Mr. Foster, and the other gentlemen have so clearly and forcefully indicated.

The **Chairman**. I think that completes everything. You gentlemen can take your seats now. I do not see any use in having any more talking; we have had a lot of talking this morning.

Now let each side send one up here, and we will give them 5 minutes each. Since the last group has just spoken—excuse me, Judge; what were you trying to say?

Mr. **Bell**. I did not mean to interrupt. I had an evidentiary matter I needed to present.

The **Chairman**. You have what?

Mr. **Bell**. An evidentiary matter. There have been some false charges made here about Mr. Milliken and also about——

The **Chairman**. Just have a seat, Judge.

Mr. **Bell**. About Georgia Pacific. I wanted to put Mr. Hahn on to testify that Georgia Pacific has never been charged with a criminal violation of the antitrust laws; Senator Tydings said they had. He also said they had pled nolo; they have never pled nolo. I would like to correct that, and I would like to get it expunged from the record. I would also like to correct it as to Mr. Milliken and the Milliken Co.

The CHAIRMAN. Let me ask Senator Tydings.

Senator Tydings, do you wish to retract your statement, or do you have evidence?

Mr. TYDINGS. Until I produce the actual evidence, I will retract the statement, Mr. Chairman. The Mead Corp. pled nolo in 1976. I would, however, like to put in the entire record of antitrust changes including consent decrees of the Department of Justice and the Federal Trade Commission involving Georgia Pacific, Weyerhaeuser, and Mead.[1]

Mr. TYDINGS. I will take Mr. Bell's word on it. I stand corrected.

Mr. BELL. I would like to get it expunged from the record, because it is not a very good thing to be accusing people of a crime when they have not committed a crime.

The CHAIRMAN. Since he has retracted it, it will be expunged from the record. We will just ask this reporter to eliminate anything in the record concerning Georgia Pacific and Milliken.

Mr. FOSTER. Why Milliken?

Mr. BELL. Why Milliken?

Mr. FOSTER. I have never made any charge that Milliken was charged with a criminal violation of the antitrust laws.

Mr. BELL. Senator Tydings made it. You are in the same group.

Mr. FOSTER. No; I am not in the same group, I am sorry.

The CHAIRMAN. It will be expunged from the record, if it was made.

Let us see. Judge, you were first. We will give you both 5 minutes. Go ahead while you are sitting here. I do not think it makes any difference. We have not got a jury here, and I think I can remember what each one of you says.

Mr. BELL. I am sure you can.

The CHAIRMAN. As long as you are there, just go ahead, and take 5 minutes apiece.

Mr. BELL. Fine. I want to just clear up one other point. The implication may have been that there had been a trial on damages in the *Houston* case and the *New Orleans* case—that is the *Plywood* case and the *Corrugated* case. The damages have not been set; there has been no trial on damages.

Mr. Susman was throwing about the figure of $2.5 billion damages. I do not think anyone knows at this time what the damages will be. I think we all are guilty of talking in such big figures that we just assume there are a lot of damages.

I said at one point that no plaintiff would recover as much as the lawyers. I meant by that, no plaintiff in a class action. I would exclude the Burlington, because that is not a class action, but these class actions are what I meant, and I stick to that.

Mr. Chairman, there is one other thing I would like to say before I get to the heart of this matter. In the *Burlington-Milliken* case, despite everything that Mr. Foster was able to say, he did not mention that the district judge, Judge Dupree, put in his opinion that, if he had the power, he would be inclined to reduce the damages based on the damages that had accrued from the Leesona Corp., Burlington having settled $12 million worth of damages with them for $600,000, and now Milliken is being called on to pay that $12 million less the $600,000.

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[1] Letter to Chairman Strom Thurmond can be found on page 615.

Judge Dupree did not think he had the power to reduce damages, but he said he would be inclined to do so if he could. That is the kind of case it was. That is a statement of the equities of the matter.

Now, here is the problem we are having. I think the hearing today has been a good thing, because we have finally drawn the issue. It has been hard to pin anybody down, but we have finally got to it.

Mr. King—I did not know he was going to get to rebut, but he will have a chance to answer this—talks in terms of substantive law. He does not like the law as the Supreme Court has said it is. He just says that his position is that he does not believe any law ought to be applied to a pending case. It is unfortunate he lives under the law we have, because that is the law now.

The Supreme Court just last year, in *Mobil Oil* v. *Gulf Offshore*, repeated what the law is, and that is, if there is a change in the remedial law, it applies to pending cases.

In that case, some poor seaman had gotten a large verdict. After the verdict was rendered, the Supreme Court rendered a decision in which they said that the judge had to tell the jury that a claimant, such as this seaman, would not have to pay income tax on the amount of the award. Since that law changed after the verdict, Mobil was entitled to a new trial so that the jury could be told of the new law of damages. That is a case between private parties. That is the law in this country.

Mr. Susman used the same terminology. They both talk about substantive changes. In my view as a lawyer, I think contribution is substantive. There is a difference amongst lawyers over that, but I think it is substantive, and that is the reason I never have advocated that it be applied to a pending case.

But just computing damages, as you would in claim reduction, is remedial. I believe a court would hold that it was remedial. If that is true, if that is the law now, then section (e) takes away a right we have under the law. That is the right to have the court decide the matter as to whether it is remedial or not. If it turns out it is remedial and Congress has left (e) in the statute, which says it shall not apply to a pending case, it will only be applied in the future, then we have indeed lost a right that the law now gives us. I do not believe the Senate or this committee would want to treat anyone in a nonneutral way.

The law has to be operated on neutral principles. With (e) in the bill, this is a nonneutral law. It is designed to help a few people who have had some settlements they were worried about. That is all that I can see that it does from the claim reduction standpoint.

So I would like for the committee and the chairman to give serious consideration as to whether (e) operates in a nonneutral fashion so as to take away from us a right that we already have. I believe that is the real issue in this matter. I think it finally gets down to that. Are we talking about remedial law or substantive law?

I think Mr. King may have unwittingly put his finger on it, because he never did talk about remedial. I cannot believe that he has adopted a policy or personal philosophy that no remedial change in the law will ever apply to a pending case, because most of us are willing to follow whatever the Supreme Court holds, and that is what the Supreme Court has held.

I agree with Mr. King and Mr. Susman if they are only talking about substantive changes in the law. Contribution is substantive, I think, and that should not be applied to a pending case. That is the reason I thought this was a fair compromise. This is as fair a compromise, I believe, as can be devised, and I think it is one on which all reasonable people ought to be able to agree.

When all the shouting is done, this is not just a matter that applies to a few companies who have lost cases. All those cases are still in the courts; some will be reversed; some may not be. It applies to business generally.

The thing that the chairman, the committee, and the Congress are interested in is to cure an evil that is now in the law and to do it in a fair way, and that is all we ask, Mr. Chairman—that we be treated fairly.

Thank you.

The CHAIRMAN. Thank you, Judge.

Come around, Mr. King. You have 5 minutes.

Mr. KING. Judge Bell has exhorted the committee and the Senate to be neutral. We would agree with that. We think neutrality could be achieved by a clear statement in the Senate report itself that the approval of S. 995, as introduced, was not meant to preclude a court today from adopting a rule of law by judicial decision, so that if Judge Bell is correct and the memorandum that he submitted in October of last year that there exists today a right of claim reduction in antitrust cases, he would be free, and the parties in these cases would be free, to advance that argument and allow a court to decide it ultimately, the Senate having made clear that, in adopting S. 995, as introduced, it was not meant to preclude a court from doing so. We would have no objection to that as a sound basis for compromise.

Judge Bell has just said that I have lost sight of what is a remedial statute. Well, I would ask the chairman and the committee to make its own decision on that question. After all, what we are concerned about is having the law applied to a situation where rights had vested, where a plaintiff class has already won a jury verdict entitling them to a certain amount of damages, and the Congress comes in with a statute that takes away a very substantial portion of those damages. I suggest that that is not merely remedial but raises some very serious questions of substantive law.

Charles Alan Wright is a very distinguished constitutional scholar, law professor, and practitioner. He has supplied an opinion in this matter which I have appended to my written statement. In that opinion he addresses this very point. The question is whether or not claim reduction applied retroactively to pending cases would pass muster under the Constitution. This is what he said:

> The objection based on due process seems to me to raise a complex and uncertain issue. Adoption of this legislation, with a retroactivity amendment, would be a certain invitation to litigation, raising due process claims, which litigation could hardly be authoritatively received short of the Supreme Court.

As noted a scholar as Professor Wright, coming to that conclusion as he did, I do not think that it is fair for companies like Mead, Georgia Pacific, Milliken, and others who have lost jury verdicts, to put the burden of litigating that issue to the Supreme Court on the defendants who settled and bought their peace years ago, thinking they were relieved entirely of this litigation.

Finally, it has been said at least a dozen times this morning that there have been sweetheart settlements entered in these cases. I resent that. I do not think any one of the settlements was a sweetheart settlement.

When my client settled, which was early in the *Corrugated* situation, we settled at a value that, if all of the defendants had settled at, would have amounted to a total fund of $100 million. I do not regard that as a sweetheart settlement. At that time, that would have been the largest antitrust class action settlement ever in the history of the United States. That is not a sweetheart settlement.

The reason the companies are willing to pay such enormous amounts to settle these cases does not really turn on whether there is a right to contribution or claim reduction; the real evil comes from something else, and that is that you have in these cases the class action technique which aggregates the claims of all of the purchasers in the United States into an enormous claim for damages. Then, on top of that you impose the treble damage remedy; you treble the amount of damages that are found on behalf of all purchasers in the United States.

There are many companies who say to themselves:

> We cannot bet our stockholders and our welfare on what a jury might find in Houston, Texas, or New Orleans, or anywhere else, with that kind of odds against us, and that is why we settle cases.

That is the real evil here, and there has not been one sweetheart settlement in any of these cases that I am aware of.

The CHAIRMAN. Mr. Kohn was representing the plaintiffs. Maybe he ought to have a couple of minutes. Is 2 minutes long enough, Mr. Kohn?

Mr. KOHN. I just want to correct two incorrect statements made by Judge Bell, and that is all I want to correct.

In the first case, in the *Plywood* case, there are judgments on damages as well as judgments on liability. There were four summary judgments entered by Judge Pointer. Those were affirmed unanimously by the court of appeals, and they also affirmed a $10,000 award of sanctions because the defendants in that case had failed to produce certain records during the trial. So there are judgments on damages. There are also now summary judgments pending against these defendants for certain other persons.

Second, with respect to the fact that, in these cases, no claimant has ever gotten more than the lawyers got paid. In the *Western Sugar* case one claimant—with which Judge Bell should be particularly familiar, since their headquarters are in his home town—received a payment of some $6 million, which was 7.5 times the counsel fee I received in that case, and the same thing has been repeated in case after case after case, so that I think that leaves a misconception when he brings out that old tired canard that class action suits are entirely for the benefit of the lawyers.

Thank you.

The CHAIRMAN. Now, is there anything else anybody has to say? [Laughter.]

We have listened to the officials; we have listened to all the lawyers; we have been here for 4½ hours, and tried to be patient, and give all of you an opportunity to be fully heard.

Now the record will be made up, and the Senators will have to read the record. Most of them are tied up in other meetings or, for reasons sufficient to themselves, could not be here today. But do not be disturbed because a Senator is not here; their staffs were present; they will read the record, and I am sure they will do what they think is right, just, and proper in handling this bill.

We will leave the record open for 1 week if there is anything else to go in it, and we will have to judge as to whether it is proper to go in it. The chief counsel will judge that.

We will now stand adjourned.

[Whereupon, at 2:05 p.m., the hearing was recessed, subject to the call of the Chair.]

APPENDIX A

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

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JOEL S. LISKER, CHIEF COUNSEL AND STAFF DIRECTOR

February 12, 1982

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
2226 Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are some questions I want to submit and have answered for the record of the hearing held by the Committee on the Judiciary on S.995 on February 10, 1982.

Please submit the set of questions pertaining to the "Corrugated Case" to James McSwiney, President, Mead Corporation, Dayton, Ohio; Stephen D. Susman, Susman and McGowan, Houston, Texas; and Henry King, Davis, Polk & Wardwell, New York, New York. Submit the questions pertaining to the "Plywood Case" to Harold Kohn, Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania; John Clute, Boise-Cascade Corporation, Boise, Idaho; and T. Marshall Hahn, Jr., President, Georgia-Pacific Corporation, Portland, Oregon.

Sincerely,

Jeremiah Denton

Jeremiah Denton
United States Senate

JD:pjf

Enclosures

CORRUGATED CASE

1. What are the potential damages that Mead Corporation is liable for in the Corrugated Case? When is it anticipated that the Court will assess the damages Mead Corporation is to pay?

2. Please chronicle all settlement offers made to the Mead Corporation, both prior to and after the verdict in the Corrugated Case, giving the dates and methods by which the offers were made; the parties involved; the reasons the settlements were rejected; settlement offer amounts; any counter-offers made by Mead; and any other information pertinent to an understanding of the status of settlement attempts in this case.

3. By what amount would the enactment of the "Locavara amendment" reduce the damages that the plaintiffs could recover from the defendants in the Corrugated Case?

4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the Corrugated Case.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation? What has occurred to make this such a pressing issue now?

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

7. What solution would you offer to a plaintiff in a pending case -- say a company which purchased plywood to use in homebuilding -- which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

10. The Mead Corporation has claimed to many of us that if it has to pay the judgment in the Corrugated case, it will be bankrupt. Yet press reports and SEC figures allegedly quote the Company as denying serious concern about the case. Please comment.

PLYWOOD CASE

1. What are the potential damages that Georgia-Pacific Corporation is liable for in the Plywood Case? When is it anticipated that the Court will assess the damages Georgia-Pacific Corporation is to pay?

2. Please chronicle all settlement offers made to the Georgia-Pacific Corporation, both prior to and after the verdict in the Plywood Case, giving the dates and methods by which the offers were made; the parties involved; the reasons that the settlements were rejected; settlement offer amounts; any counter-offers made by Georgia-Pacific; and any other information pertinent to an understanding of the status of settlement attempts in this case.

3. By what amount would the enactment of the "Locavara amendment" reduce the damages that the plaintiffs could recover from the defendants in the Plywood Case?

4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the Plywood Case.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation? What has occurred to make this such a pressing issue now?

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

7. What solution would you offer to a plaintiff in a pending case -- say a company which purchased plywood to use in homebuilding -- which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

RESPONSES OF JAMES W. McSWINEY TO QUESTIONS RAISED BY SENATOR JEREMIAH DENTON

1. What are the potential damages that Mead Corporation is liable for in the Corrugated case? When is it anticipated that the court will assess the damages Mead Corporation is to pay?

In the trial of the class action, plaintiffs failed to submit evidence from which a jury could determine the amount of damages, if any, sustained by the class. Plaintiffs' attorneys did this because they knew that no jury would award damages in the hundreds of millions of dollars against Mead, which had only 2-1/2 percent of the market. Such an argument would have shocked the conscience of the jury. Instead, plaintiffs' counsel, Mr. Susman, argued to the jury that they were only to determine the "measure of damages" and that the amount of damages was "immaterial" to their deliberations because no one knew whether the judge would require Mead to pay damages based upon the sales of other companies. Mr. Susman led the jury to believe that the court may order claim reduction and that, whatever their verdict, Mead may well be liable only on its own market share. Mr. Susman said to the jury:

> Ladies and Gentlemen, if the judge felt the amount of money was material to your deliberations, instead of asking for a percentage in question 7, what you're going to get tomorrow, he would have a dollar sign. But he doesn't anywhere in that instruction ask you to compute a dollar amount, because in a case like this, no one knows who's going to file claims. No one knows what the judge is going to eventually determine whether the law requires Mead to be responsible for someone else's sales. It's simply immaterial. (Tr. Vol. 99 at 346-48)

The jury, therefore, did not decide the amount of damages, if any, that Mead was liable for in the case, nor did it decide that Mead should pay damages based upon the sales of others.

As of this date, there is no judgment entered in the *Corrugated Container Litigation* against The Mead Corporation, nor is one expected for many months. To attempt to cure plaintiffs' attorneys' failure of proof as to damages, if any, the district court, after dismissing the jury, appointed a special master to determine damages, contrary to Mead's right to a jury trial on all issues. Plaintiffs' lawyers have estimated that if the measure-of-damages formula is applied on a classwide basis, then a potential judgment could be in the hundreds of millions of dollars, a figure that Mr. Susman previously told the jury was "immaterial." But while plaintiffs' lawyers have made such claims, there has been no final adjudication that Mead should be liable for any dollar amount. While Mead is confident that the court of appeals will ultimately reverse any judgment that may be entered, the threat of such a judgment, even if ultimately reversed, violates our basic principles of fundamental fairness. No company which believes in its innocence should be subjected to exposure to such substantial damages because its competitors seek to saddle it with their own liability.

2. Please chronicle all settlement offers made to The Mead Corporation, both prior to and after the verdict in the Corrugated case, giving the dates and methods by which the offers were made; the parties involved; the reasons the settlements were rejected; settlement offer amount; any counteroffers made by Mead; and any other information pertinent to an understanding of the status of settlement attempts in this case.

In response to this question, I am attaching two letters that have been prepared by counsel which outline settlement discussions--one is a letter of August 4, 1981, to Senator Thurmond from Harold F. Baker, our trial counsel; the other is dated September 10, 1981, addressed to Steve Susman from our assistant general counsel, John Irvine. On a number of occasions, Mead has been willing to settle with the plaintiffs for a reasonable amount. Mr. Susman's last offer was to settle for $76.6 million, with an indication that he would take to his committee an offer by Mead in excess of $50 million. A settlement range of $50-75 million bears no relationship whatsoever to any other settlement in the case. Instead, it is an attempt to extort from Mead millions of dollars because of the threat of exposing Mead to damages based upon industrywide sales.

In contrast, International Paper Company, which pled nolo contendere to criminal charges, as did four of its employees, paid $1 million per market-share point to settle, for a total of $8.3 million. Mead offered to settle on the same basis, but plaintiffs refused. Currently, Mr. Susman is saying that Mead should pay between $20 million and $30 million per market-share point, even though Mead only has 2-1/2 percent of the market, was acquitted in the companion criminal case and had no employees indicted.

3. By what amount would the enactment of the Lacovara amendment reduce the damages that the plaintiffs could recover from the defendants in the Corrugated case?

Currently, there is no judgment for any amount of damages against The Mead Corporation. Mead is convinced of its innocence and that it will ultimately prevail in the court of appeals. However, it is wrong that a potential judgment based upon industrywide sales should hang over Mead. If Mead is ultimately exonerated, there would be no damages that plaintiffs would recover against Mead and, thus, the Lacovara amendment would not reduce damages at all. In terms of potential damage exposure, plaintiffs' lawyers claim that Mead should be liable for damages in the hundreds of millions of dollars based upon industry sales, even though they settled with other defendants at far less amounts and even though they argued to the jury that the judge might order claim reduction, and, therefore, told the jury that the "amount of damages" was "immaterial" to their deliberations. Under the Lacovara amendment, Mead would be exposed to damages based upon its own market share--which is what plaintiffs' lawyers suggested to the jury.

Plaintiffs would not be deprived of hundreds of millions of dollars by such an amendment. First, Mead has not been held liable for any amount. Second, plaintiffs' lawyers cannot so argue, yet claim that they are willing to settle for $50 million to $75 million. Since they are willing to settle for that amount, the Lacovara amendment does not take anything away from the plaintiffs other than the leverage that they hold in trying to extract an unreasonable settlement.

> 4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved, the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the _Corrugated_ case.

Mead has always been convinced that the settlements in the _Corrugated Container_ litigation would not be in jeopardy if claim reduction were applicable to that case. This is confirmed by the fact that of 36 companies which settled, only International Paper Company continues to oppose applying claim reduction to pending cases. Many companies which affirmatively support an amendment are settling defendants in that litigation.

International Paper Company asked Mead if it would consider indemnifying it if its settlement were upset by reason of the legislation. On Wednesday, June 24, 1981, Ralph Kittle, an officer of International Paper Company, suggested to an intermediary that International Paper would consider withdrawing its objections to an amendment making S.995 applicable to pending litigation, if Mead would indemnify International Paper in an amount up to $80 million for any potential loss in the event International Paper's settlement were set aside as the result of the legislation. On Thursday, June 25, 1981, Mead's lawyers met with lawyers for International Paper in New York City, as a result of the suggestion by Mr. Kittle.

The meeting was attended by Harold F. Baker of Howrey & Simon and Gerald D. Rapp, Senior Vice President and General Counsel of The Mead Corporation, for Mead, and Henry King of Davis, Polk & Wardwell and Byron Kabot, an attorney in International Paper Company's Law Department, for International Paper. There was considerable discussion of the details of an agreement, and Mead's lawyers indicated the company would consider such an agreement.

On June 26, 1981, at approximately 10:30 a.m., Henry King called and conveyed the message that the International Paper management "does not want to do this." No reasons were given.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation. What has occurred to make this such a pressing issue now?

The contribution and claim reduction legislation was originally introduced on May 15, 1979, as an amendment to the Antitrust Procedural Improvements Act of 1979, S.390. Senator Bayh's proposed amendment was silent as to its application to pending cases and, therefore, would have applied immediately in pending cases under the normal rule of statutory construction.

Although none of the plaintiffs' attorneys who testified during the hearings on June 8 and 12, 1979, opposed, or even discussed, application in pending cases, some of the witnesses supporting the legislation did recommend to the committee that it should apply to pending cases. For example, Donald G. Kempf, Jr. of the Kirkland & Ellis law firm in Chicago testified:

> I think it is important that however the matter [of prospectivity] is resolved, it not be done in the way that would interfere with the authority of the courts to address the problems of people currently in litigation . . . . The proposed legislation should not be made prospective only, but at the same time there should be preservation of settlement agreements . . . . (Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, United States Senate, 96th Congress, 1st Sess. on S.1468, at 83 (June 8 and 12, 1979)).

Subsequently, when S.1468 was introduced as a separate bill, it contained language that made it apply only to future cases filed subsequent to enactment. Although this was favorably reported by the Committee on the Judiciary on July 31, 1979, it was generally understood that as a separate bill, S.1468 would not be considered by the Senate as a whole during the

96th Congress. Therefore, although the need for the legislation was obvious, there was never any need to grapple with the necessity for making it applicable to pending cases.

As you know, our understanding proved to be the fact, since the matter never came before the full Senate during the 96th Congress. During the last Congress, there were no hearings held in the House of Representatives concerning the legislation.

Only during this Congress have prospects of passage of this important legislation increased. As a result of the debate over the applicability date, a study was made of pending cases which demonstrates that the abuses which this legislation is designed to eliminate should not be delayed.

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

We support application of claim reduction in pending cases in order that the "rule of reasoned fairness" that is contained in section 4I(b) of S.995 be applied in a consistent, uniform, and fair manner in all pending antitrust cases within the scope of the legislation. There is no reason to make any special provision for the various categories of pending cases listed in question six. To do so would result in discrimination among various litigating parties. For example, applying claim reduction only to cases in which there have been no settlements would be unfair to hundreds of companies in cases where there have been one or more settlements, merely because of the accident of the date of enactment. We believe that the amount of damages a defendant pays should be based upon that defendant's market share. Settling defendants should not be permitted to shift their liability to their smaller competitors.

7. What solution would you offer to a plaintiff in a pending case--say a company which purchased plywood to use in home-building--which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

There is no instance to my knowledge in the actual Plywood case that presents the facts you suggest in the hypothetical. When plaintiffs' lawyers settled with some companies, they could not assume that they would recover a single dollar from nonsettling defendants, since those defendants might prevail in the litigation. There is no final judgment on a classwide basis against the defendants in the Plywood litigation. Moreover, it is my understanding that plaintiffs' lawyers assumed the possibility of claim reduction, since some of the settlements provided for claim reduction.

Of course, the parties to existing settlements could not make any promise concerning the liability or lack of liability of any other remaining defendant in their case. When settlements were entered, the settling parties had no way of knowing whether any other co-defendant would settle for any particular amount, go to trial, be found liable for damages, or be found liable for no damages.

In the Corrugated case, plaintiffs cannot properly argue that they assumed they could recover damages against Mead based upon the sales of the settling defendants. Early in the litigation, Mead argued that claim reduction should apply to any settlement. At the time the district court preliminarily approved the settlements on May 20, 1979, the only appellate decision on the issue permitted rights of contribution and claim reduction. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). The legislation then pending would have applied to the case, since, on May 15, 1979, Senator Bayh had offered an amendment in markup of S.390 permitting contribution and claim reduction which was silent as to the applicability date, and, thus would have applied to pending cases under the normal rule of statutory construction. Significantly, Mr. Susman urged approval of the settlements even though claim reduction might apply to the case. He said:

> But I'm saying that the Court, in assessing that argument, we were asking the Court to say that present law is such that Susman, et al. had right under present law the acceptance of $298 million from the 22 settling defendants has not reduced the total amount they can recover, if they can recover any. That's present law. Now that doesn't mean that three years from now or two years from now, or a year from now, when the case goes to the jury and the Fifth Circuit decides something and holds that these admiralty cases suddenly get applied to antitrust cases, that Susman, et al. will be in the same position, but under present circumstances, he's right. 1/

The district court, in approving the settlements, said that the nonsettling defendants could raise the issue of claim reduction later, stating:

> Why isn't this argument [for claim reduction] one that can be made after, assuming there is a jury verdict, and after damages have been assessed, why can't this same argument be made in a motion to reduce the damages as it's applicable to some individual defendant?
>
> * * *
>
> Isn't that when you make this argument, rather than now . . . . Even if I finally approve it [the settlements], you still get down to the same argument--[t]he jury comes in with damages and Packaging and Westvaco, let's say, are the only two defendants on trial. And the jury, comes in with an award that's "X" millions of dollars. And you say, Judge, my goodness, that's unfair to us. The jury is assessing against us a greater share of the market than we should bear. And so, therefore, you should reduce this judgment by some proportion of our share of the market, just as they did when they negotiated the settlements.
>
> It seems to me that that is when this argument should properly be made and could be persuasive, but it seems to me premature to be making that argument at this time.
>
> * * *

1/ Tr. at 68.

> [I]t seems to me that it [claim reduction] would be an argument that you could make at the conclusion of the case when you're talking about a motion before the Court to reduce the damages against those defendants that go on trial on the basis that they're--the jury, having considered all of the market in assessing these damages on trial a greater portion of the damages than they should sustain because we--after all, we only sold one percent of the market and you're asking us to share 100 percent of the damages. [2]

Thus, obviously, plaintiffs were on notice of claim reduction, yet sought approval of the settlements anyway. Moreover, the jury also assumed the possibility of claim reduction, since Mr. Susman argued to the jury in his closing argument that the "amount of damages" was "immaterial" to their deliberations because no one knew whether the judge would subject Mead to damages based upon the sales of others.

> 8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

Settlements in pending cases are absolutely protected by the express language of proposed amendments, and I am informed that established law provides that existing settlements cannot be reopened because of new legislation that applies in pending cases. Under the proposed amendments, no finally adjudicated cases will be affected in any way. Therefore, plaintiffs which are now entitled to damages under law will obtain them. Those who merely have claims that have not been resolved will be able to pursue them.

> 9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

International Paper Company has purportedly opposed this legislation in the Congress on the grounds that there may be a risk, however slight, that their existing settlement might be upset by the legislation. In response to these concerns, specific language has been suggested that would protect existing settlements. Moreover, there is a strong public policy favoring finality of settlements and favoring settlements as a means of resolving litigation.

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[2] Tr. 52-56.

What is unfair about settlements in pending cases is that by entering into a settlement for less than a company's market share, it can simultaneously escape liability for its share of any damages and attempt to shift that liability to one of its co-defendants that also may be a competitor.

This results in enormous damage exposure being placed on those who are most convinced of their innocence and attempt to litigate to prove that innocence. It is wrong to attempt to place a confiscatory tax upon a company for seeking to prove its innocence. In the Corrugated case, the settlements are said to be the largest in the history of antitrust litigation. All 24 of the settlements reviewed were approved because they were found, after considerable scrutiny by the courts, to have been fair, adequate and reasonable. The Fifth Circuit Court of Appeals specifically has reserved the question whether claim reduction should be ordered as to The Mead Corporation, saying that the issue of the applicability of claim reduction is "irrelevant" to approval of the prior settlements as being fair, adequate and reasonable--but that claim reduction should be decided at a later date.

10. The Mead Corporation has claimed to many of us that if it has to pay the judgment in the Corrugated case, it will be bankrupt. Yet press reports and SEC figures allegedly quote the company as denying serious concern about this case. Please comment.

Plaintiffs' lawyers claims in the Corrugated case have variously been expressed in the hundreds of millions of dollars. Mead believes that it will ultimately prevail in the litigation. Mead is concerned, however, with the effect of a judgment during the pendency of an appeal. It is wrong to permit companies like International Paper Company which, along with several employees, pled nolo contendere to felony and misdemeanor charges, to use the antitrust laws to gain a competitive advantage by attempting to shift their liability to others.

What Mead is seeking is basic fairness for not only itself but the hundreds of companies in America involved in pending litigation which could be subjected to the abuses that this legislation is designed to remedy. Any objective lawyer, I am confident, would agree that there is no way settlements are in jeopardy--which is obvious from the fact that most companies which settled the Corrugated case either support an amendment or are neutral. Only International Paper Company continues to oppose. How can it possibly be wrong for the courts to apply claim reduction in pending cases where that is fair!

I appreciate your interest in this legislation and urge your support for an amendment so that hundreds of American companies in pending cases will be afforded the fair opportunity to defend themselves.

March 29, 1982

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HAROLD F. BAKER
(202) 383-7039

August 4, 1981

The Honorable Strom Thurmond
United States Senate
209 Russell Office Building
Washington, D. C. 20510

Re: Claim Reduction/Contribution Legislation

Dear Senator Thurmond:

On June 22, 1981, Mr. Stephen Susman, Chairman of Plaintiffs' Steering Committee in the Corrugated Container Antitrust Litigation, sent copies of a letter to members of the Senate Judiciary Committee which was addressed to Gerald D. Rapp, Senior Vice President of The Mead Corporation. [1] In that letter, Mr. Susman asserts that he made an offer to me, Harold F. Baker, counsel for Mead, to settle the corrugated class action with Mead for approximately \$3 million (\$1 million for each percentage share of market). These statements are not accurate -- in fact, they are directly contrary to fact.

1. At no time, either in June of 1978 or in the fall of 1978, did Mr. Susman or anyone else representing plaintiffs give to Mead an offer to settle for an amount of approximately \$3 million or for any other amount.

2. In June, 1978, at breakfast in the Whitehall Hotel in Houston, I discussed settlement with Mr. Susman, but no offer was made by either of us. Mr. Susman expressly stated that he was going to Europe (England, I believe) and that upon his return he would canvass the members of his Steering Committee and, after doing so, give to me for transmittal to Mead a dollar figure at which plaintiffs would be willing to settle with Mead. Mr. Susman, however, never carried out this promise and did not communicate to me, either by telephone or in person or by letter, a settlement offer.

3. When I subsequently called Mr. Susman to remind him of his commitment, he denied his earlier promise. He made it clear he had no interest in continuing the discussion begun in June and at no time did he make any offer of settlement for \$3 million or other-

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[1] While the letter was addressed to Mr. Rapp, the original of the letter was never received by Mr. Rapp.

wise. Mead, on the other hand, was willing to settle on the same basis as International Paper Company.

4. Mr. Susman asserts that in open court in December, 1978 a spokesman for Mead and other defendants said that they would not settle for "as much as $1 million per point." This statement is simply untrue and we are at a loss to understand how Mr. Susman can make the statement even in the heat of advocacy. Specifically, Mr. Susman states in his letter:

> Later in the fall I called Mr. Baker and stated we would entertain a settlement offer from Mead for then $1 million per point. 1/ About a week later at a conference held in open court a spokesman for all indicted defendants, including Mead, unequivocally stated that those defendants would not settle for even as much as $1 million per point. . . .

This statement is untrue in its entirety. The fact is that on December 14, 1978, Mr. Leroy Jeffers of the law firm of Vinson & Elkins stated in open court that a number of defendants (including Mead) were ready and willing to settle on the same basis as International Paper Company. 2/ Mr. Jeffers, at pp. 23-24 of the transcript, stated:

> The second proposition we wish to address to the discretion of the Court and the Court's equitable consideration and preliminary approval of these settlement agreements is that these settlement agreements have been entered into and are presented to the Court as being fair and reasonable settlement agreements. If they are fair and reasonable settlement agreements as to the Defendants International Paper Company and St. Regis Paper Company, they are fair and reasonable settlement agreements as to all of the other defendants because the margin of time is not such as to alter that.
>
> We have not yet plunged into this massive discovery program which lies ahead of us. At least 12 of the major market share defendants in this case stand ready at this time -- and I will state upon the record -- to enter into settlement negotiations with the plaintiffs on the basis of the International Paper Company settlement formula. And I think I can say with reasonable certainty that a bulk of this litigation could be disposed of on that basis and a major market share removed from the litigation. . . . [Emphasis added]

1/ As in paragraph 2 above, this statement is untrue.

2/ International Paper Company settled at $1 million per point.

> I do not purport, in making these statements to the Court, to speak for each and every defendant, but I do certainly speak for a substantial number of defendants.

The above statement of Mr. Jeffers was made with the full knowledge and approval, and at the request, of Mead and Mead was one of the 12 referred to by Mr. Jeffers. This is the exact opposite of what Mr. Susman now states. So there is no misunderstanding as to the truth in this matter, attached hereto are copies of the transcript of December 14, 1978, pp. 23 and 24, containing the offer of Mr. Jeffers, which offer was rejected by Mr. Susman.

5. The corrugated container class action litigation went to trial in May of 1980 and was submitted to the jury on September 11, 1980. On September 5, 1980, Mr. Susman made his first and only offer to Mead to settle. On that date, a hand-delivered letter was given me, a copy of which is attached hereto, which read in total as follows:

> Dear Hal:
>
> The plaintiffs hereby offer to settle this case with Mead for $36,500,000. Unless we hear from you, this offer expires at 6:00 p.m. today.
>
> Sincerely yours,
>
> Stephen D. Susman, Chairman

6. The amount for which plaintiffs offered to settle ($36,500,000) was more than $12,000,000 for each 1% share of market held by Mead (Mead's market share is approximately 2-1/2 to 3%). This was more than 12 times the amount paid for each 1% market share by International Paper Company, the largest paper company in the United States, as follows:

> International Paper Company (8.3% market share) -- $8,300,000 = $1 million per 1% share of market
>
> Mead (3% market share) -- $36,500,000 = $12.17 million per 1% share of market

The proffered settlement of $36,500,000 was more than four times the average amount (per 1% share of market) of settlement for all defendants. All defendants other than Mead settled for approximately $315,000,000. It was obvious from the foregoing that plaintiffs were not dealing fairly with Mead and the settlement offer was declined.

Mead's objective throughout has been simply to achieve fair and equitable treatment. This has been the company's position in seeking a reasonable settlement and also has been Mead's sole objective in urging the remedial legislation with which you are familiar.

Very truly yours,

Harold F. Baker

Harold F. Baker
Counsel for The Mead Corporation

HFB/jc

Encls.

MANDELL & WRIGHT
ATTORNEYS AND COUNSELORS
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STEPHEN D. SUSMAN
PARTNER
BOARD CERTIFIED-CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELEPHONE
(713) 228-152

September 5, 1980

DELIVERED BY MESSENGER

Mr. Harold F. Baker
Defendants' Trial Office
San Jacinto Bldg., Suite 700
911 Walker
Houston, Texas 77002

In Re: Corrugated Container
Antitrust Litigation
M.D.L. 310

Dear Hal:

The plaintiffs hereby offer to settle this case with Mead for $36,500,000. Unless we hear from you, this offer expires at 6:00 p.m. today.

Sincerely yours,

Stephen D. Susman

STEPHEN D. SUSMAN, Chairman
Plaintiffs' Steering Committee

SDS:BD

cc: All Plaintiffs' Counsel

PRETRIAL HEARING

DECEMBER 14, 1978

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:)
)
CORRUGATED CONTAINER) MDL No. 310
)
ANTITRUST LITIGATION)

I, Yvette F. Perry, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the following is a true and complete transcript of the pretrial hearing had in the above styled and numbered cause before the Honorable John V. Singleton, Jr., United States District Judge, on the 15th day of December, A.D. 1978.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas, on this the _____ day of December, A.D. 1978.

YVETTE F. PERRY
Official Court Reporter

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Mr. Hugh Harsha

The second proposition we wish to address to the discretion of the Court and the Court's equitable consideration and preliminary approval of these settlement agreements is that these settlement agreements have been entered into and are presented to the Court as being fair and reasonable settlement agreements. If they are fair and reasonable settlement agreements as to the Defendants International Paper Company and St. Regis Paper Company, they are fair and reasonable settlement agreements as to all of the other defendants because the margin of time is not such as to alter that.

We have not yet plunged into this massive disovery program which lies ahead of us. At least 12 of the major market share defendants in this case stand ready at this time -- and I will state upon the record -- to enter into settlement negotiations with the plaintiffs on the basis of the International Paper Company settlement formula. And I think I can say with reasonable certainty that a bulk of the litigation could be disposed of on that basis and a major market share removed from the litigation.

It is also my belief that upon the basis of the St. Regis Paper Company's settlement formula, that the bulk of the remaining defendants would be eager and ready to go forward with settlement negotiations so that judicial economy would be achieved, the best interest of the class for whom the plaintiffs have been certified to sue would be achieved by an early disposition of this litigation, in all likelihood, without the tremendous expense occurring of costs and attorneys' fees involved in this massive discovery schedule and in a trial of gargantuan length.

I do not purport, in making these statements to the Court, to speak for each and every defendant, but I do certainly speak for a substantial number of defendants.

So our proposal to the Court is

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Mead

September 10, 1981

Stephen D. Susman, Esq.
Susman & McGowan
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Houston, Texas 77002

Re: MDL 310, Corrugated Container Litigation

Dear Steve:

Over the last two months I have met with you and other members of the plaintiffs' steering committee on numerous occasions to discuss a possible settlement of this litigation. Since the beginning of these negotiations, I have expressed to you Mead's commitment to a concerted, good faith effort to reach a settlement with your committee. We are still so committed.

However, on September 4, 1981 I received your letter setting forth the current settlement position of your steering committee and imposing an artificial time limit on our negotiations. That letter was considered by our Board of Directors on Tuesday, September 8, 1981, during a thorough review of the status of this case and our settlement negotiations. For the reasons set forth below, your offer of $76,640,000 is totally unacceptable to Mead.

A fair consideration of the nature of your settlement negotiations with The Mead Corporation requires some reference to the settlements you negotiated with Mead's co-defendants. From the outset, your committee pursued a settlement strategy which permitted defendants who settled early to do so at amounts per market share substantially below those who settled later. Although the amount paid per percentage point of the market increased over time to a maximum of $6.5 million per point, neither interest nor attorney fees were ever paid by any defendant as part of the settlement amount despite the fact that those settlements occurred over a two-year period of time from July 21, 1978 to September 3, 1980. That settlement strategy was effective because by settling early and at relatively low amounts with companies with high market shares, you dramatically increased the exposure of remaining defendants. The net effect was that companies were intimidated into settling rather than take the risk, however remote, that they would be unable to prove their innocence. In this case, fourteen companies who were later found to be innocent settled with you before trial for a total amount exceeding $45 million.

As you know, The Mead Corporation, unlike many of the defendants with whom you negotiated early settlements, was acquitted in the prior criminal trial. The company has been equally committed to defending itself against the unwarranted charges brought against us by your committee.

On September 5, 1980 you made your first offer of settlement to The Mead Corporation. That offer of $36.5 million, made just prior to the submission of the case to the jury, consisted, according to you, of a principal amount of $20.8 million plus interest of $7.7 million computed at 20% per annum (despite the fact that the previous settlements were earning approximately 12% in escrow) and attorneys' fees of $8.0 million. This arbitrary inclusion of attorneys' fees and the prejudgment interest was totally unprecedented in prior settlements.

On July 14, 1981 I conveyed an offer of settlement to you of $25 million. That amount represented $10 million per point of market share, an amount far in excess of the highest rate paid by any other company. You failed to respond in any way to that offer until August 4, 1981, three weeks later. Your response was a counteroffer of $76,640,000, which you said was determined by subtracting the total principal amounts of the previous settlements, $321 million, from your estimate of the single damages of $374.9 million. To that figure of $53.9 million you added prejudgment interest of 15% per year for 2-1/2 years.

I think you appreciate why that offer is totally unreasonable and unacceptable. In the first place, it represents a rate of $30.6 million per point; over thirty times higher than the rate paid by International Paper, a company which, along with four of its employees, was convicted of a felony in the earlier criminal proceedings, and almost five times higher than the rate paid by the Continental Group, the company which paid the highest rate. Additionally, such an amount would represent, based on your own estimates, approximately 1-1/2 times the total of treble damages attributable to Mead's sales.

Since August 4, 1981 Mead has increased its offer of settlement to $28.5 million and has indicated to you a willingness to increase our offer further if you would, in turn, reduce your demands. To date, your committee has refused to give Mead a firm offer at any amount less than your only post-verdict offer of $76.6 million and you have gone so far as to tell me that Mead should not even consider offering any amount less than $50 million.

Finally, you suggest in your letter of September 4, 1981 that it is highly unlikely that this case could be settled for an amount less than $75 million after September 15, 1981, an obvious reference to the Senate mark-up of S.995, the contribution/claim reduction bill.

Certainly Mead remains ready to negotiate in good faith with your committee. However, we refuse to be intimidated by suggestions that the value of a fair settlement with your committee will increase after the Senate mark-up.

Along with numerous other companies, Mead has been working to seek passage of remedial legislation which would grant defendants in antitrust price-fixing cases rights of contribution and claim reduction. The need for such legislation is greatest in many pending cases. The corrugated container litigation is a prime example of such a case. Indeed, members of your committee have expressed their belief that Mead will be unable to withstand the financial pressures caused by the overhang of a judgment in excess of $500 million and will have to settle on your terms. While we believe that we can and will handle any such pressures, it is totally unfair that Mead or any other company be in such a position.

The pre-trial and trial record in the corrugated case is so fraught with error that Mead's chances on appeal are overwhelming. That opinion is shared by our trial counsel, other outside counsel retained to review the case, and most members of the antitrust bar familiar with the case. It is an opinion shared, I believe, by members of your steering committee. That is why we remain determined to pursue the case through appeal if necessary and are confident that we will prevail.

We are willing, however, as we have been, to negotiate in good faith and to settle this litigation on reasonable terms. Such a settlement must be fair relative to those of other defendants and to the alleged damages attributable to Mead's sales. We believe that this approach is consistent with the best interests of all parties.

Sincerely,

JAI:ea

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February 22, 1982

Hon. Jeremiah Denton
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

In Re: Senate Bill 995

Dear Senator Denton:

On September 12, 1982, you submitted to Senator Thurmond a set of questions that you wanted him to have answered by various participants in the *Corrugated* case. On behalf of the 200,000 American businesses constituting the plaintiff class in that case, I am pleased to submit the attached answers.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely yours,

Stephen D Susman

Stephen D. Susman, P.C., Chairman
Plaintiffs' Steering Committee

SDS:BD
Enclosure

cc: Members of the Committee on the Judiciary

CORRUGATED CASE

1. A. What are the potential damages that Mead Corporation is liable for in the Corrugated Case?

Answer

Approximately $700 million.

B. When is it anticipated that the Court will assess the damages Mead Corporation is to pay?

Answer

During the summer of 1982. The Special Master, assigned by the trial court with the task of determining the dollar volume of sales by Mead and its co-conspirators (the percentage overcharge was determined by the jury), is holding the last hearing during the week of March 1 and is expected to have his report to the Court within 60 days.

2. Please chronicle all settlement offers made to the Mead Corporation, both prior to and after the verdict in the Corrugated Case, giving the dates and methods by which the offers were made; the parties involved; the reasons the settlements were rejected; settlement offer amounts; any counter-offers made by Mead; and any other information pertinent to an understanding of the status of settlement attempts in this case.

Answer

In July 1978 at a breakfast plaintiffs' counsel, Marc Seltzer of Los Angeles and Stephen Susman of Houston, attended with Mead's counsel, Harold Baker, of Washington, at the Whitehall Hotel in Houston, Texas, the class offered to settle with Mead for a million dollars per point, or for $3.2 million. Mr. Baker laughed and responded that a settlement with Mead of around $1 to $1.5 million in total might be more in line, but that he wasn't even sure he could recommend that Mead pay that much.

In August 1978, International Paper did not laugh when the same offer was made to them. They settled for a million dollars a point or $8.3 million. A month later, the class was certified.

In October and November 1978, Mead was informed that plaintiffs would settle for $2-$3 million per point. No offer from Mead was forthcoming.

In December 1978, Mead stated through an attorney in open court in Houston, that it would not settle with the class, ever, for as much as $2 million per point or $6.4 million.

In January 1979, twenty other defendants settled for an additional $288 million. The $298 million in settlements up to that time were deposited in banks and have earned interest at the rate of 15% per annum in 1979 and 1980 and 20% during 1981. Some settling defendants paid as much as $6 to $6.5 million per point. Mead was offered the opportunity but declined to settle at $6.5 million per point.

In June 1980, prior to commencement of the civil trial, the class approached the remaining non-settling defendants--Mead, Alton Box Board, and Westvaco--and offered to settle with them as a group for $40 million. Each had approximately the same share of the market, and Mead's pro rata share would have been about $13 million. Mead offered $8 million in response.

In July and September of 1980, Alton and Westvaco, during the course of trial, settled for $5 million and $1 million respectively. Mead never offered more than $8 million.

On September 5, 1980, just before the case went to the jury, the class representatives thought that in order to be responsible--not to be blackmailers or opportunists or gamblers--they had to go to Mead with a sensible settlement offer. We offered to settle with Mead, the day before the case went to the jury, for $36.5 million calculated in the following way. Continental Group had paid $6.5 million per percentage point of the market. Mead, paying the same amount, would have to pay $21 million. But Continental Group had paid that to the class one and two-thirds years earlier. So we had to add interest and that brought the total up to $26.4 million. And then because the class incurred expenses of at least $10 million for trying the lawsuit, we added that to $26.4 million and came up with $36.5 million. That settlement demand did not include one penny for punishment, not a penny demanded because Mead insisted on its day in court. When Mead received our written offer of $36.5 million, they stated "You must have misplaced a decimal point."

From September 13, 1980 (the day of the jury verdict), through July of 1981, we told Mead that if they were willing to pay more than $36.5 million, more than what we had offered the day before the jury verdict, that settlement negotiations would be fruitful. Mead, having gambled and lost, cavalierly responded that they might be willing to come up from $8 million if we were willing to go down from $36.5. In July, Mead offered $25 million.

On August 4, 1981, the class offered to settle with Mead, for $76.6 million calculated in the following way. Actual damages of $374 million for 2-5/6ths years, less settlements of $321 million, leaves the class short $53 million. If we asked Mead to pick up this actual damage shortfall of $53 million and if instead of trebling, we only added interest at 15% for 2-1/2 years--that's about $76 million. Looking at it another way: 5% of Mead's sales during the period, times 3, is approximately $53 million. If Senate Bill 995 became law and were applied to this case, Mead's exposure would be $53 million. Add interest at 15% for 2-1/2 years and that's about $76 million.

In early September, Mead increased its offer to $28.5 million and the class dropped its demand to $75. At the same time the Chairman of Plaintiff's Steering Committee informed Mead that he would urge the Steering Committee to accept any offer over $50 million.

In December, the Plaintiffs' Steering Committee informed Mead that it would be willing to settle with Mead for whatever it could afford to pay and still remain a viable supplier of corrugated containers. Mead rejected this offer.

In January, 1982, Mead made it clear to plaintiffs that it will not increase its $28.5 million offer as long as there remains a chance that the Senate Judiciary Committee will bail it out. The plaintiffs, on the other hand, informed Mead that they would be unwilling to consider anything less than $50 million even if Senate Bill 995 is made retroactive by the Senate. Mead responded it would not pay $50 million even if the attempt to make Senate Bill 995 retroactive is defeated. Plaintiffs doubt this. But there truly is an impasse at the present time.

3. By what amount would the enactment of the "Locavara amendment" reduce the damages that the plaintiffs could recover from the defendants in the Corrugated Case?

Answer

Approximately $650 million.

4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the Corrugated Case.

Answer

Not applicable.

5. A. Plese explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation?

Answer

Because only those price-fixers that had gone to trial and lost are concerned about retroactivity.

B. What has occurred to make this such a pressing issue now?

Answer

Mead, Georgia-Pacific, Milliken have now lost jury verdicts.

6. A. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements?

B. Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

Answer to A & B

We are making this response only for the 200,000 businesses who are plaintiffs in the Corrugated case, and we know they oppose retroactivity in a manner that would deprive them of what they have already won. We do not purport to speak for them on the general wisdom of contribution or claims reduction in the future. Therefore, we do not know whether they would support such legislation. However, we also do not know whether they would oppose the prosivions you describe.

7. What solution would you offer to a plaintiff in a pending case--say a company which purchased plywood to use in homebuilding--which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

Answer

There is no way to justify this result as fair or constitutional. It is obvious the plaintiffs accepted settlements from many defendants that would have been unacceptable had Mead not been liable for the rest of their damages. Most noticeable in this category are early settlements and hardship settlements. The courts have expressly found that neither of these types of settlements constituted sweetheart deals. Consider, for example, just the hardship settlements where the court has found that the plaintiffs have extracted all that the defendants in question could afford to pay. The facts on the three here are:

Defendant	Amount Demanded Per Plaintiffs' Settlement Formula	Amount Defendant Could Afford to Pay	Shortfall
Alton Box	$18.6 million	$5.4	$ 13.2
Consolidated Packaging	6.38 million	.180	6.2
Interstate Container	3.2 million	.400	2.8
			$ 22.2

Should the plaintiffs, through no fault of their own whatsoever, be deprived of the $22.2 million settlement shortfall on these defendants simply because Mead chose to conspire with companies that might not be able to pay their "fair share"? Can anyone argue that the victims of a price-fixing conspiracy rather than the conspirators should assume the risk that a member of the conspiracy will go broke?

We would point out that if Mead were to pay only what the Continental Group did per point plus the settlement shortfall of these hardship settlements plus interest, Mead would have to pay over $66 million calculated as follows:

Plaintiffs' January 1979 demand of Mead ($6.5 per point)	$20.8
Settlement shortfall	22.8
	$43.6
Interest (3 years at 15%)	22.7
Total	$66.3 mil.

Furthermore, apart from settlements, this case was tried on the premise that Mead would be liable for the sales of all its co-conspirators and no one can predict what would have happened had the plaintiffs limited their proof to Mead:

(a) had Mead not been able to argue that it would be liable for all co-conspirators' sale, the jury might have found a higher overcharge than 5%.

(b) had plaintiffs not had to focus on the activities of 20 other co-conspirators, the jury might have found fraudulent concealment on the part of Mead alone, and this would have lengthened the damage period.

Damages in this case = % overcharge X sales per year X years of damage period. Making Senate Bill 995 retroactive affects the sales component but deprives the plaintiffs of an opportunity to relitigate the other components.

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

Answer

Not applicable.

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

Answer

The courts have ruled that 22 of the 36 settlements are fair to the plaintiffs; 14 are pending final approval. Mead has never urged any court to disprove any settlements on the ground that the settling defendants paid too little!

10. The Mead Corporation has claimed to many of us that if it has to pay the judgment in the Corrugated case, it will be bankrupt. Yet press reports and SEC figures allegedly quote the Company as denying serious concern about the case. Please comment.

Answer

Mead's claims of possible bankruptcy are ridiculous in view of the plaintiffs' position that they will never ask Mead to pay a penny more than it can afford to pay and remain a viable competitor.

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WRITER'S DIRECT NUMBER:

February 25, 1982

The Honorable Jeremiah Denton
5327 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Denton:

Chairman Thurmond has forwarded to me your letter of February 12, 1982, in which you request that I answer certain questions regarding the Corrugated Container case. Although several of the questions could be answered more authoritatively by other parties, please find below my own responses:

> 1. What are the potential damages that Mead Corporation is liable for in the Corrugated Case? When is it anticipated that the Court will assess the damages Mead Corporation is to pay?

The jury in the Corrugated case found Mead liable for an overcharge of 5% on sales by all co-conspirators to the plaintiff class from March 7, 1973 to December 31, 1975. A Special Master was appointed by the Court and is now in the process of holding hearings to determine the dollar amount of sales to which that percentage overcharge will be applied. It is not anticipated that the court will be in a position to enter a judgment, based on the results of those hearings, prior to the summer of 1982. Plaintiffs' counsel has estimated Mead's liability in the neighborhood of $700 million, after trebling, and after deducting the $321 million paid in settlement by the settling defendants, but International Paper has not undertaken its own analysis of Mead's potential liability.

2. Please chronicle all settlement offers made to the Mead Corporation, both prior to and after the verdict in the Corrugated Case, giving the dates and methods by which the offers were made; the parties involved; the reasons the settlements were rejected; settlement offer amounts; any counter-offers made by Mead; and any other information pertinent to an understanding of the status of settlement attempts in this case.

This question can only be answered authoritatively by attorneys for Mead and the plaintiffs.

3. By what amount would the enactment of the "Locavara amendment" reduce the damages that the plaintiffs could recover from the defendants in the Corrugated Case?

Assuming the court were to find that the application of claim reduction retroactively to the Corrugated case would not result in "manifest injustice", enactment of the "Locavara amendment" would reduce the total damages the plaintiff class could recover from Mead to about $50-55 million, based on plaintiffs' counsel's estimate of Mead's potential liability. The class would still have the $321 million paid in settlement by the other defendants. With accumulation of interest that amount is substantially more than $400 million.

> 4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status in indemnification offers in the Corrugated Case.

On the morning of June 24, 1981 I received a telephone call from Mead's counsel proposing that Mead indemnify International Paper for any losses it might sustain as a result of the retroactive application of S. 995 in return for which International Paper would agree to support retroactivity. Later that day I met in person with Mead's counsel and raised a number of problems I perceived with that proposal, including the following. I asked Mead's counsel whether Mead was proposing to indemnify other settling defendants, which were in the same position as International Paper. They responded that at that point in time they could not go further than to make the proposal to International Paper, and suggested that it may never be necessary to indemnify all other similarly situated settling defendants. I raised the question as to the potential unenforceability of any such indemnity agreement on public policy grounds. I also suggested that both Mead and International Paper would be required to publicly disclose the indemnity arrangement because of its materiality to both parties and to the court in the Corrugated case. We also discussed the settling defendants' obligations under the settlement agreements to use their best efforts to effectuate the terms and conditions of the agreements.

The foregoing problems were not resolved at the meeting with Mead's counsel. Notwithstanding, International Paper gave careful consideration to the indemnity proposal and decided that it could not, under the circumstances and in view of the problems noted above, accept it. I communicated this to Mead's counsel within a day or two of the meeting.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation? What has occurred to make this such a pressing issue now?

When S. 1468, a bill similar to S. 995, was first considered by the Congress several years ago, the issue of applying its provisions to pending cases was not to our knowledge presented to the Senate Judiciary Committee. In 1979 that Committee passed S. 1468 with an identical provision to subdivision (e) in S. 995, calling for prospective application only. It was only after a few defendants in the Corrugated and Plywood cases decided not to settle and subsequently lost at trial that the issue of retroactivity came before the

Committee. These few defendants are now attempting to achieve through legislation that which they failed thus far to achieve through the court system.

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

As I stated at the February 10, 1982 hearing, we would not object if S. 995 were applied retroactively to cases where there have been no settlements, so that the settlements would not be at risk, or where there have been no verdicts or judgments entered--that is to say, if it were applied retroactively to those ordinary cases still in pretrial procedures. Our concern with retroactivity is focused on cases where action has already been taken by the parties and the courts in rulings and in settlements on the basis of existing law. Applying S. 995 to those cases would result in serious legal problems, but applying it to those cases where none of that has occurred permits the advantages of the law to be obtained in such cases.

7. What solution would you offer to a plaintiff in a pending case--say a company which purchased plywood to use in homebuilding--which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that as fair? As constitutional?

We believe that this question is more appropriately answered by counsel for the plaintiffs and for Mead. We can state, however, that the issues posed in this question are the very same issues that we have been concerned with ever since it was first proposed that S. 995 be made applicable to pending cases. Those issues raise troubling questions which ensure that there will be further costly litigation, and uncertainty and delay before ultimate resolution.

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

In those cases where settlements have been entered into on the understanding that there would be no contribution and no claim reduction, there is, in our opinion, no basis for protecting both the plaintiffs who won and the defendants who lost.

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

We do not believe that any of the settlements in the Corrugated cases were or are unfair. My client, International Paper, was among the first of the defendants to settle. If all defendants had settled on the same basis as did International Paper, the aggregate amount paid to the class would have been $100,000,000, the largest settlement in the history of antitrust class actions to that date. This can hardly be called unfair. Moreover, under the Federal Rules of Civil Procedure, the court in a class action is required to inquire into the fairness and adequacy of settlements. The District Court in the Corrugated case did just that, and made extensive findings in which the factual and legal issues were examined at great length. The District Court determined that the settlements were fair, reasonable, and adequate. In Re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. ¶ 64,114 (CCH) (1981). Such determination was unanimously affirmed by the Court of Appeals for the Fifth Circuit. In Re Corrugated Container Antitrust Litigation, 659 F.2d 1322 (5th Cir. 1981).

10. The Mead Corporation has claimed to many of us that if it has to pay the judgment in the Corrugated case, it will be bankrupt. Yet press reports and SEC figures allegedly quote the Company as denying serious concern about the case. Please comment.

While the plaintiffs can speak more authoritatively on this question, it is public knowledge that they have offered to settle with Mead for something in the range of $50 million to $75 million. I don't know of anyone who believes that such a settlement would cause Mead to declare bankruptcy. Indeed, Mead itself has stated publicly that it is not exposed to material liability. As reported in the New York Times for June 4, 1981, Mead's counsel stated that Mead has not increased its litigation reserves of $3.3 million at all and that, "We think we have zero liability based on the Houston verdict."

We would be happy to supply any further information you desire.

Respectfully yours,

Henry L. King

Memorandum attached to letter to Chairman Thurmond
and Senator Denton from Harold E. Kohn
dated February 25, 1982

1. What are the potential damages that Georgia-Pacific Corporation is liable for in the Plywood case? When is it anticipated that the Court will assess the damages Georgia-Pacific is to pay?

A) It is assumed that the reference to the liability of Georgia-Pacific for damages refers to the total liability of all three Defendants remaining in the litigation, namely, Georgia-Pacific, Weyerhaeuser and Willamette. It is our understanding that these Defendants have entered into a Sharing Agreement among themselves which allocates their respective shares approximately 5/9th to be paid by Georgia-Pacific and approximately 2/9ths to be paid by each of the other two corporations. The amounts mentioned in this reply are the total damage figure, of which Georgia-Pacific's share would be approximately 5/9th.

B) Georgia-Pacific primarily, and to some extent the other Defendants as well, have made a number of public representations with respect to the amount of anticipated damages (which are inconsistent) summarized below. Your attention is called particularly to the press release in The Wall Street Journal of February 5, 1982. A summary of these statements follows:

Immediately after the trial in November 1978, counsel for defendant Georgia-Pacific Corporation stated that application of the jury's measure of damages would result in a total verdict against all three defendants of $10 billion.

In a footnote to its first audited financial statement following the trial, i.e., for the year ended December 31, 1978, Georgia-Pacific drastically revised this figure downward, stating:

> "Based upon estimates of industry sales, the total damages after the required trebling under the relevant statute could be as much as $1.5 to $2 billion using the jury's measure of damages..."

On February 14, 1980, the Court entered typical judgments in favor of four class members to permit prompt appeals, which after trebling amounted to a total of $1,101,913. These four judgments ranged in amount from $268.38 to $649,345.

In their brief before the United States Court of Appeals for the Fifth Circuit, defendants Georgia-Pacific, et al stated:

> "the damages from one southern mill for a single month totaled nearly $3 million before trebling. (Vol. 56, Tr. 3293) Under the verdict, if sustained, the defendants would be held liable for the sales of each of the approximately 190 mills in operation between 1968 and 1973."

The apparent implication of this statement is patently absurd, that damages for the 70 month damage period (between February 23, 1968 to

December 31, 1973) would be $1.71 billion per month ($3 million times 190 mills, trebled) thereby totaling $119.7 billion.

In earlier motions before the Fifth Circuit, defendants represented that "damages could total hundreds of millions of dollars".

In their moving papers seeking a rehearing before the Court of Appeals on October 2, 1981, defendants stated:

> "the judgment affirmed by the panel could result in the largest damage award ever--as much as $2 billion."

On January 13, 1982 defendants represented to the Supreme Court of the United States that damages "could reach $2 billion".

However, after all this, on February 5, 1982 The Wall Street Journal finally reported:

> "In January, Georgia-Pacific said its auditors would qualify its 1981 results because of the antitrust case. Both Willamette and Georgia-Pacific said that the estimates of total liability for the three companies of $1.5 to $2 billion were 'significantly excessive'."

To date, in addition to the judgments of the four class members referred to above, motions for summary judgment are on file on behalf of class members based upon sales by 20 of the original 34 defendants. The amount of damages sought on the sales which are the subject of those motions is $277,621,141 after trebling.

The trial Court has indicated that it desires to resolve all issues regarding damages by the late Fall or Winter of 1982. Such resolution may be the subject of further appeals.

2. Please chronicle all settlement offers made to the Georgia-Pacific Corporation, both prior to and after the verdict in the Plywood Case, giving the dates and methods by which the offers were made, the parties involved; the reasons that the settlements were rejected; settlement offer amounts; any counter-offers made by Georgia-Pacific; and any other information pertinent to an understanding of the status of settlement attempts in this case.

The settlement offers were previously summarized in reports to your Committee, a copy of which is appended hereto as Exhibit "A".

Defendants have understood for several months the settlement proposal of Plaintiffs but have not made any specific counter proposal thereto. Defendants understood that Plaintiffs are willing to meet at any time that Defendants are willing to discuss specific dollar settlement amounts.

3. By what amount would the enactment of the "Lacovara amendment" reduce the damages that the plaintiffs could recover from the defendants in the Plywood case?

In the first place, there are at least two different "Lacovara amendments" being circulated, neither of which has been formally presented as a Bill or an amendment to a Bill by any Senator. Each is confusing, as we have previously noted in reports and testimony before your Committee. It is our understanding that Defendants would take the position that the "Lacovara amendment" would reduce their liability by approximately 17% computed as follows: Georgia-Pacific, Weyerhaeuser and Willamette have among them approximately 58% of the total Plywood production, allocated among them in the proportions set forth in 1(A) above. In addition, they claim that 25% of the total is represented by the production of other Defendants who were parties to the Sharing Agreement, with whom Plaintiffs have settled, which accounts between those two groups for a total of 83% of the production. Accordingly, all that remains as the maximum possible deduction under the "Lacovara amendment" would be the balance of 17%, or roughly $340 million in the event of a $2 billion damage determination, which would in turn be divided in the proportion of 5/9th to Georgia-Pacific and 2/9th to each of the other two corporations.

If the $2 billion estimate is in fact excessive and the damage determination is ultimately less, then, of course, these amounts would also be proportionately reduced.

4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the Plywood Case.

We are not aware of any such indemnification offers in the Plywood litigation.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation? What has occurred to make this such a pressing issue now?

Plaintiffs respectfully suggest that this is not a pressing issue now and that your Committee and the Congress are being burdened simply because of the unprecedented lobbying effort being made by these three Plywood Defendants, by the Mead Corporation, in the Corrugated Case, and by Milliken, in order to evade payment for liability clearly established and carefully considered in long litigated lawsuits. In 1979, industry as a whole was not interested in retroactivity, realized that it would be unconstitutional and would result in almost endless litigation, and these four or five groups had not yet been finally declared liable in the lawsuits which have since continued to establish such liability. Now, by this blatantly special legislation, completely out of step with their own industry and industry generally, they are seeking to have Congress nullify judicial decisions in which they alone are interested.

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which are entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

We respectfully suggest that neither we nor any other lawyer or party interested in the efficient and effective administration of justice could suggest that a contribution bill be applied to existing litigation at any stage of such litigation or under any circumstances. Indeed, there is grave question as to whether it should even be applied to existing causes of action which have not yet been the subject of litigation. Any such application to existing cases is bound to result in years of otherwise unnecessary litigation at great expense, with a tremendous burden upon an already overburdened judicial system.

7. What solution would you offer to a plaintiff in a pending case -- say a company which purchased plywood to use in homebuilding -- which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

Frankly, I don't think there is any solution to be offered to a Plaintiff in a pending case under any suggested proposal for retroactivity. The result is not fair and no Plaintiff could be persuaded that it is. We have also covered elsewhere, as have other witnesses, the point that it is not constitutional.

One serious repercussion would be that people who now have confidence in the basic integrity of the American judicial system will become cynical, lose their faith, and undermine the general acceptance of the independence of our judiciary, which is essential to a constitutional democracy. The alternative is what unfortunately exists in so many other countries throughout the world whose populations, including businessmen, do not have confidence in the integrity of their Courts.

Whatever one may feel about changing the law in the future, regardless of the issue or subject, most Americans accept that as being appropriate under a rule of law. Nobody will accept the integrity of a legislative act which upsets a prior judicial decision, particularly when such legislation is obtained for the benefit of a handful of wealthy corporations which have hired as lobbyist lawyers so many former government officials, some of whom took an opposite position when they were in public office.

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

For the reasons stated above and in our prior appearances and presentations to your Committee, we regret to say that we know of no way in which the interests of our clients could be protected if a contribution act is made retroactive.

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

This question focuses attention squarely on what the Georgia-Pacific group is trying to do, and the total lack of merit in their position. The prior settlements are not unfair and everybody knows it. They have been reached in arms-length negotiations by able lawyers on both sides, buttressed on the side of the Defendants by very able and astute businessmen and their advisers. The Georgia-Pacific group had precisely the same opportunity to dispose of this litigation on a sensible and fair basis. No one can objectively suggest that these settlements were not eminently fair. Indeed, the Georgia-Pacific group (with ambivalence) from time to time calls the settlements "sweetheart settlements", the inference being that they are not high enough because of some devious private deal. That also, of course, is another misrepresentation.

The settlements in the Plywood case were carefully considered and approved by one of the ablest judges in the Federal court system, The Honorable Sam C. Pointer, of the District Court in Senator Denton's home state, sitting by special designation in this litigation. No appeal was taken by any of the many interested parties.

In the same Fifth Circuit, in the Corrugated litigation, the Court of Appeals affirmed the settlements initially approved by another able District Court judge, Judge Singleton in Texas.

As you probably know, these cases were subject to the most rigid scrutiny because they are class suits under Rule 23 of the Federal Rules of Civil Procedure, where the Courts are accorded a much wider range of oversight and control than in almost any other litigation. Indeed, Courts, in such litigation, can impose settlements on Plaintiffs when Defendants make settlement offers, after notice to the Class and hearings as to the propriety of the proposals. Georgia-Pacific and its co-Defendants well know, as do their counsel, because of settlements in other litigation in which they were involved, with the same people, that there is no legitimate issue as to the fairness of the settlements made by Plaintiffs in this litigation.

Exhibit "A"

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MEMBERS
DISTRICT OF COLUMBIA BAR

September 17, 1981

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
209 Russell Building
Washington, D.C. 20510

Re: S-995

Dear Senator Thurmond:

We understand that Georgia Pacific and its associated defendants in the Plywood antitrust litigation are renewing the efforts to add a retroactivity provision to the pending Contribution Bill, S-995.

As trial counsel for the Plywood Plaintiffs and thousands of class members, I believe your Committee should be apprised of several significant facts, which indicate that the Georgia Pacific group's position is without merit.

(1) Georgia Pacific, Weyerhaeuser and Willamette, the three defendants against which judgment has been affirmed by a unanimous opinion of the United States Court of Appeals for the Fifth Circuit, have between 45% and 50% of the market. Approximately half the remainder of the market, or approximately 25% of the total, is shared by three other producers, Champion International, Louisiana Pacific ("spun off" from Georgia Pacific), and International Paper Company, all three of which settled with Plaintiffs well in advance of trial. These settling defendants and the Georgia Pacific group were parties to a so-called "sharing agreement" by which they undertook either to share in the payment of any judgment or to require Plaintiffs, in the event of a settlement, to reduce the judgment proportionately. When Plaintiffs settled with Champion, et al, we agreed to that reduction, so that the judgment now rendered against Georgia Pacific and the other two trial defendants has been reduced by one quarter, without the aid of any new legislation.

Plaintiffs also settled with approximately 25 other companies, most of them small producers, who together had about 25% of the market. These smaller companies were not parties to the sharing agreement and their production does continue as a basis for liability on the part of Georgia Pacific, Weyerhaeuser and Willamette.

Accordingly, no matter what legislation is passed, whether retroactive or not, Georgia Pacific, Weyerhaeuser and Willamette will have to pay at least half of the judgment and are not obliged to pay more than 75% of it.

. We respectfully suggest that it would be inappropriate because of this relatively small proportionate reduction in the liability of these three companies to jeopardize and confuse the situation in literally hundreds of other pending cases by making contribution retroactive.

(2) Georgia Pacific, Weyerhaeuser and Willamette, all represented by the same counsel, stubbornly refused to make any settlement in any amount whatsoever, unlike nearly 30 other defendants. Interestingly enough, two of the settling defendants had also been represented by the same law firm, but shortly after obtaining other counsel entered into very modest settlements. The Georgia Pacific group were offered precisely the same opportunity. Indeed, "offered" is hardly the word; they were begged by Plaintiffs to settle. I personally visited the office of counsel in Chicago and was preemptorily dismissed without any offer being made on behalf of the defendants, despite my journey from Philadelphia. Counsel told me that they couldn't lose the case, were going to prove how soft other law firms were, and indicated their expectation that thereafter the firm would be representing all antitrust defendants of any consequence. Despite this rebuff, on June 15, 1978, I wrote counsel making a formal offer totalling $9 million, $5 million to be paid by Georgia Pacific and $2 million each by the other companies, this being generally proportionate to their production volume. The reply was that a Plaintiffs' verdict was highly unlikely and that obstacles with which I should be familiar convinced these defendants that Plaintiffs were "a long, long way from an enforceable final judgment". Nevertheless, I wrote again on June 28, 1978, urging settlement, but received no reply.

The case was tried in October - November, 1978, resulting in the verdict for Plaintiffs. Thereafter, Plaintiffs again pursued defendants seeking a modest settlement, and on December 14, 1978, I again wrote to counsel. No reply was received to my letter or subsequent telephone calls.

Plaintiffs respectfully suggest that it would be inappropriate for Congress now to reduce a judgment litigated over many years for the special benefit of three defendants who have shown such utter contempt for the opinions of their fellow defendants and have so recklessly incurred the liability, for the relief of which they now burden an already over-burdened Congress, after eight years of Court litigation.

(3) Ordinarily, we would hesitate to cite the financial status of a defendant as a relevant factor, but it is necessitated in this situation by the repeated assertions of the Georgia Pacific group to members of the Senate that the judgment (brought on themselves by their own obstinancy and arrogance) will bankrupt the Company.

They also sought to leave this impression with the Court of Appeals, which wasn't impressed thereby. Nor should the Senate be impressed, because it simply isn't so.

The same financial burden argument was expressly made by the three defendants to the Court of Appeals for the 5th Circuit, and the defendants had their opportunity to convince the Court on this issue. It is clear that the Court was not persuaded by this contention, and did not believe it to be relevant. Having failed to convince the Judges, the Georgia Pacific group is now beginning all over again with the Senators.

At most, as stated above, if the final judgment is $1.5 billion, the retroactive clause would reduce it by $375 million. Of this amount, approximately $175 million would be paid by Georgia Pacific, and $100 million by each of the other corporations.

We quote a brief portion of a pleading filed with the Court of Appeals, which alludes to this subject:

> "... what may be 'large' for one company to bear may be easily taken in stride by another with enormous cash flow and assets, such as these defendants. The ability of Georgia-Pacific and Weyerhaeuser to pay such a judgment without undue strain is unquestioned. The 1978 Financial Statements of these two appellants show they generated more than $1.5 billion in funds from operations in that one year,* without taking into consideration any of the tremendous unrealized daily appreciation in value of their more than 11 million acres of forest lands, which also contain mineral resources.**

> " *See Income Statements Year Ending 1978 (Georgia-Pacific Annual Report 1979 p. 31; Weyerhaeuser Annual Report 1978 p. 33).
>
> "**E.g., Georgia-Pacific states in its Annual Report for 1979 at page 19:
>
>> 'At year-end, Georgia-Pacific net proved reserves totaled 127 billion cubic feet of natural gas and 6.1 million barrels of oil condensate.
>>
>> 'Other G-P resources include more than 130 million tons of gypsum; a 200-year supply of salt for use as raw material for chlorine, caustic soda and sodium chlorate; and the mineral rights on most of its fee-owned lands, including the rights to an estimated 242 million tons of metallurgical coal.' "

(4) Notwithstanding all of the foregoing, Plaintiffs stand ready to discuss settlement with Georgia Pacific, Weyerhaeuser and Willamette, or any of them, on a reasonable basis.

It should also be noted that the issue of retroactivity has never been aired at a public hearing. We shall be happy to appear at any such hearing to present our position and to respond to the contention of those who propose retroactivity.

We shall be happy to discuss these or any other related matters with you or other Senators or your staff, at your convenience.

Very truly yours,

HEK:hof

cc: All members of the Senate Committee

ANSWERS OF BOISE CASCADE CORPORATION TO QUESTIONS POSED BY SENATOR DENTON RE PLYWOOD CASES

1. What are the potential damages that Georgia-Pacific Corporation is liable for in the *Plywood* case? When is it anticipated that the Court will assess the damages Georgia-Pacific Corporation is to pay?

A- The district court presently is supervising discovery concerning the potential damages for which Georgia-Pacific and the other nonsettling defendants in *Plywood* may be liable. Boise Cascade does not know when this task will be completed. While Boise Cascade cannot accurately estimate the potential damages which Georgia-Pacific might be assessed, we believe Georgia-Pacific's share of a $1 billion judgment could approximate $500 million.

2. Please chronicle all settlement offers made to the Georgia-Pacific Corporation, both prior to and after the verdict in the *Plywood* case, giving the dates and methods by which the offers were made, the parties involved; the reasons that the settlements were rejected; settlement offer amounts; any counter-offers made by Georgia-Pacific; and any other information pertinent to an understanding of the status of settlement attempts in this case.

A- Boise Cascade does not have information necessary to answer this question completely, but is aware that in 1978 plaintiffs' counsel did make available to all nonsettling defendants an offer that the next two defendants to settle the *Plywood* cases could do so for $250,000 per percentage point of market share. Two defendants settled on this basis. Boise Cascade is informed that all remaining defendants had an opportunity to settle at this level immediately prior to trial. Georgia-Pacific and the other nonsettling defendants have therefore had the same opportunities to settle those cases as all other defendants.

3. By what amount would the enactment of the "Lacovara amendment" reduce the damages that the plaintiffs could recover from the defendants in the *Plywood* case?

A- Generally speaking, if claim reduction were permitted by the court, the Lacovara amendment would make nonsettling defendants liable only for damages attributable to their sales. The court has not yet determined plaintiffs' purchases in the *Plywood* cases, and Boise Cascade is therefore unable to estimate accurately what reduction in recoverable damages would result from application of the Lacovara amendment. The reduction could be in excess of 25%.

4. Please chronicle all indemnification offers made to any of the settling defendants, giving the dates and methods by which the offers were made; the parties involved; the reasons the indemnification offers were rejected; the

amounts of the offers; any counter-offers proposed by the settling defendants; and any other information pertinent to an understanding of the status of indemnification offers in the Plywood case.

A- Boise Cascade is not aware of any such offers having been made to any settling defendant.

5. Please explain your understanding of why the retroactivity issue was not raised in the 96th Congress when the Senate passed this legislation? What has occurred to make this such a pressing issue now?

A- Those companies which have sought retroactive application of the contribution bill to pending cases have done so only after the jury decisions in the Plywood and Corrugated cases. These decisions occurred after S.1468 was approved by the Senate Judiciary Committee.

6. Would you support a provision that applied contribution and/or claim reduction only to cases in which there have not been settlements? Would you support a provision that applied only claim reduction to all cases, but not to settlements which were entered into before the date of enactment? In other words, in any pending case, if a settlement has been entered, it would be preserved and plaintiff's claim would not be reduced because of that settlement. But new settlements in pending cases would lead to claim reduction. Would you support that?

A- In light of the problems outlined in our counsel's May 11, 1981, letter to Senator Thurmond, we oppose retroactive application of the bill to any pending case. However, this type of amendment to S.995 would appear to protect Boise Cascade from settlement rescission claims and the lengthy and expensive litigation which would result from those claims.

7. What solution would you offer to a plaintiff in a pending case -- say a company which purchased plywood to use in homebuilding -- which settled with a defendant for a certain amount, knowing that it could collect the rest of its damages from the other defendants, and then finds out that, because of the law which you are urging us to pass, his judgment is reduced by 50% or more? How can you explain that result as fair? As constitutional?

A- Boise Cascade opposes passage of a contribution and claim reduction bill which would apply to pending cases, the only cases in which these facts might occur.

8. Is there any way in which your interests or those of your clients can be protected in pending cases without depriving plaintiffs of damages to which they are now entitled under law and/or overturning settlements?

A- Boise Cascade's interests in pending cases would be fully protected only if contribution and claim reduction do not apply to such cases.

9. One of the premises seems to be that the settlements in pending cases are somehow unfair. If so, why have litigating defendants urged that we act to protect them? And if these settlements are unfair, why have courts sustained many of them?

A- Litigating defendants have consistently recognized that current law leads to excessive settlement payments because of the law's coercive effects. All courts which have considered the question have held that the settlements in Corrugated and Plywood are fair and adequate, and we do not believe that litigating defendants have argued otherwise to any court. All defendants recognize that fairness requires preservation of the settlement agreements in pending antitrust cases.

Settlement coercion in large antitrust cases has been the principal reason advanced for enacting S.995. Boise Cascade supports S.995 because it has suffered from such coercion in both the Plywood and Corrugated cases.

Responses of T. Marshall Hahn
To Questions Pertaining To The "Plywood Case"
Submitted By Letter Dated February 12, 1982 To
The Honorable Strom Thurmond, Chairman,
Senate Judiciary Committee

1. Georgia-Pacific Corporation (G-P) intends to petition for review by the U.S. Supreme Court the unfavorable opinion of the Fifth U.S. Circuit Court of Appeals in the civil class action plywood antitrust suit. On the same set of facts, the Ninth Circuit rendered a decision in favor of G-P.

G-P believes that the appeals court decision should be reversed or modified in whole or in part on review. However, if the decision is permitted to stand, G-P management, after reviewing the previously mentioned court decisions and after thorough study of the factors involved, believes the previous estimate of the total liability of $1.5-$2 billion for the three remaining defendants is significantly excessive and that the ultimate liability, if any, will be substantially lower, but that the corporation's ultimate liability, if any, cannot be accurately determined at this time.

It is not possible to predict when the damages, if any, will be assessed.

2. Out of necessity, settlement negotiations must remain privileged and confidential. The public discussion of settlement terms could well have the effect of precluding the parties from reaching a mutually agreeable settlement.

3. Enactment of the proposed amendment would reduce the damages the plaintiffs could recover from the remaining defendants in the plywood case substantially although the exact percentage has not been determined.

4. G-P has made no indemnification offer to any of the settling defendants.

5. First, when this legislation was originally introduced as an amendment to S.390 in the 96th Congress, it was silent as to its application to pending cases. Under well established rules of statutory construction, this legislation, if it had been enacted in its original form, would have applied to pending cases. Subsequently, in the 96th Congress, this legislation was re-introduced as a separate bill with the addition of subsection (e), which contrary to the normal and customary practice would have limited application of this legislation to future cases. The Senate never passed this bill.

Second, the application of claim reduction to pending cases is a much more pressing issue now because today there are nearly 200 price-fixing cases across the country in which more than 900 American companies, both small and large, are being victimized by the present unjust rules of liability. The right of any company to assert its innocence in an antitrust class action has effectively been eliminated.

6. The application of claim reduction only to cases in which there have not been settlements would not return the element of fairness in pending price-fixing cases. What is fair in a future case is fair in a pending case.

7. A plaintiff does not know whether a case will go to trial when early settlements are made, so it would not be in a position of "knowing it could collect the rest of its damages from other defendants."

Unless plaintiffs have entered into a settlement where they accept far less from a defendant than that defendant's fair share of the total damages, claim reduction would not lower the total amount received by plaintiffs.

As I testified before the Senate Judiciary Committee:

> "It seems clear to me that, if two defendants each cause ten dollars worth of damage, the plaintiff cannot settle with one defendant for one dollar and then grumble that it is unfair to prevent him from collecting nineteen dollars from the remaining defendant."

8. The proposed amendment would not deprive plaintiffs of damages to which they are entitled unless plaintiffs have accepted relatively small settlements from defendants, particularly those with significant market shares.

9. Some settlements in pending cases are unfair, not to the immediate parties to the settlement, but rather in their effect on non-settling defendants, who many times are less culpable and almost always have done no greater wrong than settling defendants. When a court reviews a settlement under Federal Rule of Civil Procedure 23, it generally considers only the effect of the settlement as between the immediate parties and not its effect on the other defendants. Thus, Congress should protect existing settlements while correcting the unfairness to non-settling defendants.

APPENDIX B

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TELEPHONE 202: 466-6300

May 11, 1981.

Honorable Strom Thurmond
Chairman, Senate Committee on the Judiciary
209 Russell Senate Office Building
Washington, D.C. 20010

Re: S.995 - The Antitrust Equal Enforcement Act of 1981

Dear Mr. Chairman:

Your Committee is currently considering Senate Bill 995, which would amend the Clayton Act to permit contribution of damages attributable to an agreement by two or more persons to fix, maintain or stabilize prices under Section 4, 4A, or 4C of the Act. Under existing law, an alleged price-fixer may be held liable not only for damages based upon its own sales to the plaintiff or plaintiffs, but also for damages attributable to the sales of all alleged coconspirators. The bill would permit a defendant to sue other alleged coconspirators, thereby requiring those other persons to share in any judgment pursuant to a formula set forth in the bill. Any good faith settlement by a defendant would relieve that defendant from contribution and would remove from the plaintiffs' case at least the proportion of liability attributable to the settling defendant's sales.

It has been suggested that S.995 should be made applicable retroactively to cases pending at the date of the bill's enactment. This would require amending subsection 4I.(e) of the current bill, which provides that the bill applies "only to actions under section 4, 4A or 4C commenced after the date of the enactment of this section."

The proposed amendment to the bill is inconsistent with the approach taken by Congress in other antitrust statutes and with judicial precedent. Retroactive application of S.995 to pending cases would also be manifestly unjust, imposing inequities, judicial burdens and uncertainties upon both the courts and litigants. These problems are avoided by the bill as it presently stands. We therefore urge the Committee to retain subsection 4I.(e) without change.

Both Legislative And Judicial Precedent Support Nonretroactive Application Of A Contribution Statute

While Congress has passed laws which provided exemptions from the antitrust laws on a retroactive basis, we are unaware of any federal statute creating a new civil cause of action which has permitted bringing such claims in pending cases. Indeed, the proposed application of this bill to pending cases would be totally inconsistent with previous antitrust statutes.

For example, the *parens patriae* provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 specifically precluded application of the new remedy "to any injury sustained prior to date of [the bill's] enactment." Congress expressly rejected an earlier draft of that legislation which would have permitted its use in actions "pending on the date of [the bill's] enactment." Similarly, section 4A of the Clayton Act, the civil liability provision which permits the United States to recover single damages for monetary injuries suffered by the United States due to antitrust violations, was not effective until "six months after its enactment."

Judicial precedent also supports purely prospective application of S.995. The Ninth Circuit has recognized that retroactive application of civil liability "would be as inequitable as *ex post facto* criminal liability." *Weinberg* v. *Mitchell*, 588 F.2d 275, 278 (9th Cir. 1978).*/ Indeed, in apparent recognition of this inequity, many courts construing state contribution statutes have specifically refused to apply such statutes retroactively. *See, e.g.*, *Wesolowski* v. *Rhoades*, 416 F.Supp. 1052, 1053 (E.D. Pa. 1976); *Fraley* v. *Worthington*, 64 F.R.D. 726 (D. Wyo. 1974); *United States Fidelity & Guaranty Co.* v. *The Park City Corp.*, 397 F.Supp. 411, 414 (D. Oreg. 1973); *Massey* v. *Sullivan Co.*, 464 S.W.2d 548, 549 (Tenn. 1971); *Commercial Casualty Ins. Co.* v. *Leonard*, 196 S.W.2d 919, 921 (Ark. 1946); *Norfolk So. R. Co.* v. *Beskin*, 125 S.E. 678, 679 (Spec. Ct. App. Va. 1924).

Manifest Injustice And Additional Judicial Burden Would Occur If Retroactive Application of S.995 Were Permitted

Any application of the proposed bill to cases filed prior to the date of enactment would result in manifest injustice and additional judicial burden. A few illustrations of this injustice and burden demonstrate the propriety of following Congressional precedent by retaining subsection 4I.(e) as it currently stands.

S.995 could have a substantially adverse impact on cases partially settled before the law was passed. Plaintiffs and/or defendants could seek rescission of their settlements if the bill applied to such cases. Plaintiffs facing claim reduction, which could reduce dramatically their potential recovery from non-settling defendants, could contend that their settlements with defendants were too low because they had believed they would be entitled to recover from the remaining defendants any portion of their claims not obtained through settlement. Defendants could in turn contend that their settlements were too high because, in the absence of contribution, they had been coerced into settling due to their potential exposure to all of a plaintiff's damages through the principle of joint and several liability. The burdens placed upon the courts and parties in determining the validity of these rescission claims would be substantial. If rescission were allowed, the parties' good faith expectations would be upset and their agreements destroyed.

If the proposed amendment were adopted, manifest injustice would also occur in light of the joint defense discussions which have occurred in pending cases. Since contribution has not been permitted in antitrust cases, codefendants, sometimes with non-

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*/ *Weinberg* is not inconsistent with those Supreme Court cases which have permitted retroactive application of statutes outside the antitrust area, since none of those statutes created civil liability for a new cause of action for damages. See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

defendants, have freely discussed with each other the strengths and weaknesses of the plaintiffs' case. Such discussions invariably included analyses of both facts and theories which might support or refute the plaintiffs' claims, analyses which would be of assistance to defendants prosecuting contribution claims against each other and against nondefendants. If contribution had been recognized in antitrust cases, these joint analyses would not have taken place, or would have been undertaken in a substantially different manner. It would be decidedly unfair to permit litigation of contribution claims in pending cases for this reason alone.

The contribution statute proposed in the American Bar Association Report of the Section of Antitrust Law With Legislative Recommendation, dated September 6, 1979, contains a nonretroactivity provision identical to that in S.995. The initial draft of the Section's proposed legislation had provided for retroactive application of contribution to pending cases. This provision was changed after receiving numerous comments voicing concerns over this aspect of the proposed statute. In discussing this change, the Report recognized that settlement and joint defense considerations required limiting contribution to future cases:

> Paragraph (i) establishes an effective date for the statute. The task force originally proposed making the statute applicable at once to all pending and future actions. Numerous comments on that early draft, however, demonstrated a great concern, first that such a rule would upset settlement calculations already in progress, and second that parties could be prejudiced who had already participated in the conduct of joint defense efforts on an assumption of no contribution. Accordingly, our statutory proposal would apply only to proceedings initiated after its effective date, and that is the effect of paragraph (i). (ABA Report at 16.)

These very concerns were also expressed by Judge Singleton in the Corrugated opinion which held that there is no right to contribution in antitrust cases. According to that opinion:

> If, however, the rule [concerning contribution] were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross-claims now. (In re Corrugated Antitrust Litigation, 84 F.R.D. 40, 42 (1979), aff'd per curiam, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, 101 S.Ct. 311 (1980).)

If retroactive application of S.995 were permitted, many contribution plaintiffs would have another substantial advantage in their suits against contribution defendants. The contribution plaintiffs which have defended a case and lost will usually have preserved evidence relating to the case, while many potential contribution defendants will not have done so. Many of these cases involve evidence going back five to ten years or more, making the evidence so stale that contribution defendants would be in an extremely inequitable position if they now faced contribution suits involving such evidence.

Finally, contribution claims filed in cases pending throughout the United States against defendants and nondefendants could present considerable problems in judicial administration, such as the need to restructure discovery orders, extend discovery dates and change prior judicial rulings upon which the parties had relied. Further, partially settled cases might be completely resurrected due to settlement rescission claims. Thus, the already overburdened judiciary could face greatly increased caseloads and burden in pending cases if the proposed amendments to S.995 were adopted.

Conclusion

For each of these reasons, we submit that retroactive application of S.995 is wholly inappropriate, and that subsection 4I.(e) should be retained without change.

Sincerely,

R. Clifford Potter

R. Clifford Potter

RCP/wp

MENASHA CORPORATION

MAY 14 1981

CORPORATE OFFICE BOX 367 • NEENAH, WISCONSIN 54956 • PHONE 414-729-0200

May 12, 1981

The Honorable Strom Thurmond
United States Senate
209 Russell Senate Office Building
Washington, D. C. 20510

Re: Antitrust Contribution Bill S. 995

Dear Senator Thurmond:

We have recently been advised that an amendment (as yet unsponsored) to the Antitrust Contribution Bill (S. 995) is being circulated which would serve to make the proposed bill applicable to pending cases as well as those commenced after the date of its enactment. For the reasons set forth below, Menasha Corporation wishes to express its strong opposition to any amendment to S. 995 which would give its provisions retroactive effect in any way.

As stated in my testimony, Menasha paid a large amount to settle the Corrugated Container litigation. If an amendment making this Bill retroactive could cause settlements in that case to be upset, we believe Menasha could be prejudiced, since we thought we were terminating our involvement in the litigation, and cutting off further substantial defense costs. Even if such an amendment includes language that would purport to protect existing settlements, the effect of the retroactive application of the legislation would still be to create serious uncertainty as to the status of the settlements, since it would give the plaintiff class the opportunity to argue that an important aspect of their settlements with 36 of the 37 defendants has been taken away, thus possibly depriving the class of a substantial additional recovery. We do not believe that it is fair to ask Menasha to assume any further burdens or risks in this litigation.

We respectfully request that this letter be added to and made part of the record of my testimony before the Senate Committee on the Judiciary given on April 22, 1981.

Respectfully submitted,

MENASHA CORPORATION

By
Richard L. Johnson
Chairman of the Board

FOUNDED 1849 / MENASHA, WISCONSIN

STATEMENT OF LOWELL E. SACHNOFF BEFORE THE SENATE COMMITTEE ON THE JUDICIARY ON S.995

Mr. Chairman: I welcome the opportunity to present my views on S.995, a bill which would amend the antitrust laws to permit contribution among defendants accused of price-fixing under the Clayton Act. In my opinion, based upon extensive experience in antitrust litigation representing both defendants and plaintiffs, S.995 contains serious flaws and should not be enacted. It may well be that in carefully defined circumstances, perhaps in the area of vertical restraints, some form of contribution or claim reduction should be allowed. But S.995 is seriously skewed by its limitation to horizontal price-fixing and may well deter rather than promote competition. It offers a cure far worse than the problem it seeks to address.

First, a change in the antitrust laws permitting contribution relief among price-fixing defendants would seriously erode the basic policies underlying the antitrust laws, which are to promote competition and preserve the free market economy in our country. Price-fixing (as distinguished from other "rule of reason" antitrust violations where contribution may be appropriate), has long been held to be a per se violation of the antitrust laws, and is perhaps the most serious threat to the health of our competitive economic system. That is why for over 80 years Congress and the courts have recognized the need for severe penalties for those persons and businesses who intentionally violate the antitrust laws and destroy competition by price-fixing. The lodestar of these penalties is joint and several liability of all co-conspirators for treble damages resulting from their price-fixing activities. The contribution amendment would, by permitting price-fixers to lay off a portion of their liability on other conspirators, strip joint and several liability from the antitrust laws, and thus severely impair the policy goals of these laws: (1) to deter future violators, (2) to compensate the victims of the price fix, and (3) to deprive the violators of the fruits of their unlawful conduct.

Second, in practice the contribution amendment would give comfort to price-fixers by assuring them that the economic risks of their anti-competitive conduct are substantially reduced. Contribution puts a ceiling on a violator's damages because of his claims over against others. If a price-fixing case is litigated, each violator will know in advance that he can reduce his liability by claiming over against his fellow conspirators. Thus the deterrent effect of exposure to trebled damages for industry-wide violations is removed. The business decision to measure price-fixing damages as just another cost of doing business will be far more attractive. Furthermore, this cost will be discounted because of the procedural morass that contribution will create in litigated antitrust cases; the confusion to the jury flowing from the multiple claims and cross-claims can only work to the advantage of culpable defendants in these complex cases.

Third, contribution would likely have the harmful effect of diminishing competition which the antitrust laws were designed to prevent. In most industries in which price-fixing occurs, there are some companies which are prosperous and others which are financially troubled. Successful plaintiffs are likely to seek to collect their judgments against those entities which can better satisfy those judgments. Permitting contribution will allow wholesale assertion of claims against competitors by those more prosperous businesses, and this may well result in driving poorer competitors' companies out of the business irrespective of their involvement in any conspiracy. This result cannot be countenanced.

Fourth, in a settlement context (although settling defendants are protected from claims over by non-settling defendants thus removing the chilling effect on settlements contribution would otherwise cause) the claim reduction provision of the amendment would cause great mischief. At present the law is clear that settlements reduce the amount of trebled damages ultimately assessed by the dollar amounts of the settlements paid. The amendment would require a reduction of any treble damage award by an amount treble the portion of damages directly or indirectly attributable to the earlier settling defendant. This is a wholly unacceptable result. The amendment contains no guidelines for determining how "damages" are calculated for earlier settling defendants. Does it mean or include market share, sales, size of the company, ability to pay, relative culpability, or what? This provision means that every price-fixing case that goes to trial must include a complete evidenciary case against each and every defendant who has previously settled. Plaintiffs must make this case to assure that the damage reductions are as small as possible. Non-settling defendants would be required to bring settled defendants back into the litigation to try to prove that their shares are as large as possible. Settlements would be seriously discouraged because no settling defendants could ever be free of entanglement in the litigation by paying his fair share of the damages.

Fifth, the procedural morass caused by this proposed claim reduction on settlement will sharply interfere with a plaintiff's ability to manage the litigation efficiently and inexpensively, thus deterring lawsuits which are necessary for effective enforcement of the antitrust laws. The Supreme Court has stressed the necessity of making litigation attractive to private parties, Hawaii v. Standard Oil of California, 405 U.S. 251, 262 (1972), and has sought to prevent complications in private litigation by limiting claims to those persons or entities purchasing directly from a conspirator, Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977) and disallowing defenses relating to the passing-on of costs. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 493 (1968). The Supreme Court has understood that, as a practical matter, it is important to establish clear and simple rules for application by the courts. Permitting contribution and claim reduction would greatly complicate antitrust litigation. For example, in the Corrugated Container Antitrust Litigation, MDL 310, the number of claims and cross-claims with contribution would have exceeded 2,000, many of whom are defendants who earlier settled.

Even defense attorneys, such as Messrs. Izard and Miller of the prominent Atlanta firm of King & Spaulding, concede (when writing in objective legal periodicals rather than adversary briefs for their clients) that contribution is harmful and unworkable.

> "To allow contribution among conspirators would, however, add new complications to the inextricable maze of class antitrust litigation . . . To permit defendants to seek contribution from one another would . . . greatly complicate antitrust litigation which is already labyrinthine. Plaintiffs might even lose control of their cases with defendants vouching in other members of the industry and filing cross-claims against one another."

Izard & Miller, High Price-Fixing Awards Require Abolition of Joint, Several Liability, 1 Nat. Law J. 22,23 (August 27, 1979).

Finally, little need be added to comments of Bruce Bromley (senior partner of the leading New York defense firm Cravath Swaine & Moore) concerning the already bewildering complexity of antitrust litigation:

> "I was born, I think, to be a protractor ... I could take the simplest antitrust case and protract it for the defense almost to infinity ... [One case] lasted 14 years . ... despite 50,000 pages of testimony there really wasn't any dispute about the facts ... we won that case, and, as you know, my firm's meter was running all the time -- every month for 14 years."
> Address at Stanford Law School Graduation, May, 1972

Sixth, claim reduction on settlement will markedly reduce compensation to price-fixing victims in most situations. In many industries, hard core price-fixers are companies with smaller market shares and lower profit margins; they are most culpable. If for example a settlement is reached with a marginal defendant with the largest market share, the damages assessed against the smaller but more culpable remaining defendants will be very substantially reduced by reason of claim reduction resulting from the large market share of the settled defendants. This benefit to the most culpable defendants will occur even though they are later found at trial (1) to have initiated the conspiracy, (2) to have caused the greatest damage, and (3) be better able to compensate the victims. Such a result thwarts all the basic goals of antitrust enforcement and is unacceptable.

Seventh, S.995 is an unnecessary government intrusion into an area where defendants in antitrust litigation can and normally do work out allocations of damages on a private voluntary basis, They do this by a standard form of "sharing agreement" under which the liability, if any, of the various defendants is set among them by agreement based upon some of the very same factors set forth in S.995 (paragraph 4I(b)). A most recent example of this is the defendants sharing agreement in In Re Fine Paper Antitrust Litigation, MDL 323 (E.D. Pa.) before Judge McGlynn in Philadelphia.

Finally, the different circumstances between the federal securities and antitrust laws must be underscored. The securities laws generally allow contribution among violators, thus causing some difficulty in the management of litigation as well as in settlements. However, unlike the antitrust laws, most securities cases involve one primary wrongdoer, usually an issuer of securities, who is an intentional tort feasor. The other defendants are parties secondarily liable as aiders and abettors; these persons are not intentional tort feasors but are usually accountants, underwriters, outside directors or lawyers who are liable by reason of negligent, but not intentional, misconduct. In these situations, contribution among unintentional violators has traditionally been allowed and is consistent with their far lesser level of cuplability.

For intentional price-fixing Congress and the courts have long decreed that more severe penalties, trebled damages, are necessary to serve the cause of deterrence and compensation to victims of price-fixing. The key distinction from the securities laws is that price-fixers are guilty of intentional wrongdoing. They meet in covert ways to block the natural forces of competition which are the underpinning of our free market system. They do so with full knowledge of the consequences of their actions. They are not innocent, negligent or even reckless wrongdoers. As we have seen from the exposure of price-fixing activities in the huge forest products industry, price-fixers intend to conspire to break the antitrust laws and as such should remain subject to the more severe penalty of joint and several liability for the damages they cause, without contribution or claim reduction rights.

Dated: May 8, 1981

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May 15, 1981

Statement of THE BUSINESS ROUNDTABLE on S. 995

The Business Roundtable appreciates the opportunity to present its views to the Committee on S. 995, a bill to provide for a right of contribution among parties charged with price-fixing in violation of the antitrust laws.

Roundtable Support for S. 995

The Business Roundtable is an association of nearly 200 chief executive officers of major American companies. The Roundtable's purpose is to examine public issues that affect the economy and to develop and present positions that reflect sound economic and social principles. The Roundtable is committed to the free enterprise system protected by the antitrust laws and supports the fair and equitable enforcement of these laws.

In this context, the Business Roundtable is pleased to report that it strongly supports all of the substantive provisions of S. 995. By providing that all parties allegedly involved in a horizontal price-fixing agreement must pay their fair share, and only their fair share, of the plaintiff's damages, the bill would add an important measure of fairness and rationality to the existing law. The bill would accomplish this result with a minimum of added litigation burden, through the simple formula of allocating liability for the plaintiff's damages in proportion to each responsible party's relative share of sales or purchases.

The bill's provision for "claim reduction" is also straight-forward and desirable. By requiring that, at the least, the treble damages attributable to the purchases from a settling defendant be deducted from the plaintiff's claim against the remaining defendants, the bill removes a major obstacle to the exercise of a defendant's constitutional right to contest the price-fixing charges against it. This formula for equitable reduction of remaining claims reduces the power of plaintiffs' lawyers to whipsaw defendants, particularly smaller companies, into unwarranted settlements.

By providing that a party who does enter into a good faith settlement is relieved from any liability for contribution to any other defendant, the bill provides adequate protection for parties who choose to settle the claims against them. This protection for settling defendants insures, as a practical matter, that the courts will not be clogged with antitrust cases that can be settled fairly.

The Need For Legislative Action

In the last two years, two federal courts of appeals have held, as had a number of district courts in earlier cases, that a defendant in a price-fixing case is not entitled to seek contribution from its partners in the allegedly illegal activity. See Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979), cert. granted sub nom., Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (Nov. 3, 1980); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979). A third appellate court, by contrast, held that the courts may recognize a right of contribution in antitrust cases, at least in some circumstances. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

In holding as they did, both of the courts which rejected the availability of contribution pointed to the fact that there has never been a legislative pronouncement on the question. The court in Olson explicitly rested its denial of the defendant's contribution claim on the fact that Congress has not expressly authorized a right of contribution:

> "[W]e believe this court should await a clear signal . . . from the legislative branch of our government on the matter." 1979-2 Trade Cases (CCH) ¶ 62,995 at 79,704.

The Supreme Court is now considering whether the courts have any legitimate role to play in recognizing the right of contribution in the absence of legislative guidance. A decision last month in an analogous case, in which the Court declined to imply a contribution remedy under the federal employment discrimination laws, indicates that the Court believes that it is the responsibility of Congress to fashion appropriate remedies like contribution. See Northwest Airlines, Inc. v. Transport Workers Union, 49 U.S.L.W. 4383 (U.S. April 20, 1981) (No. 79-1056).

There is no need to await the Supreme Court's action in the Texas Industries case before proceeding with consideration of legislation in this field. As a matter of legislative policy, contribution is a proper and important remedy, and Congress should exercise its responsibility for defining this policy. Moreover, legislation like S. 995 can deal with related questions -- like establishment of a formula for claim reduction and definition of the effect of settlements -- that would remain open even if the Court recognizes a "common law" remedy of contribution in the Texas Industries case.

For a variety of practical and policy reasons, allowing contribution among parties accused of horizontal price-fixing would enhance the administration of justice and would introduce a basic principle of fairness.*/

Fair Allocation of Liability

Perhaps the most important consideration in favor of S. 995 is that it assures the fair treatment of all parties who are allegedly involved in an antitrust violation. A rule which allows less than all of those involved in a price-fixing scheme to bear the entire burden runs counter to well-established principles of justice. The court of appeals in the Professional Beauty Supply case stated that fairness was the "deciding factor" in its decision to allow contribution:

> "There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer." 594 F.2d at 1185-86.

The Supreme Court agrees. Although the Court just a few days ago held that creation of a contribution remedy lies principally within the lawmaking province of Congress, the Court explained why most states have now abandoned the old "no contribution" rule:

> "Recognition of the right [of contribution] reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire

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*/Proposed Section 4I(d) states that the contribution remedy will not "affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices." The courts have generally applied the principle of joint and several liability in antitrust conspiracy cases, but we do not understand this provision as requiring application of this principle where the courts would otherwise conclude that joint and several liability is unwarranted or unjust.

> cost of reparation . . . ." Northwest Airlines, Inc. v. Transport Workers Union, supra, 49 U.S.L.W. at 4386.

Thus, there can be no real question that contribution is the soundest equitable rule.

Promotion of Deterrence

In addition, allowing a right of contribution would enhance the deterrent effects of private damage actions. In effect, permitting contribution means that every person who participates in a price-fixing scheme which is made the subject of a private suit will have to account for his fair share of any recovery obtained by the parties injured.

In the absence of a right to seek contribution, a party who agrees to fix prices always may harbor the hope that, even if he is found out, the victim or victims of the conspiracy will decide not to sue him, or decide to collect the whole judgment from others. As the Eighth Circuit said in the Professional Beauty Supply case: "This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity." 594 F.2d at 1185. The Supreme Court has recently ratified this assessment of the practical effect of a contribution remedy, concluding in the Northwest Airlines case that "it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." 49 U.S.L.W. at 4386.

The contrary argument -- that deterrence is enhanced by the threat that a single defendant may have to pay an entire judgment by itself -- simply does not hold up. In fact, a businessman will probably not be familiar with a rule disallowing contribution, and will probably assume -- as logic requires -- that any party who is found guilty of participating in a price-fixing conspiracy will have to pay his fair share. Therefore, the theoretical prospect of being saddled with an entire judgment under a no-contribution rule is unlikely to have an added deterrent effect.

Moreover, in gauging the extent of necessary deterrence, it is far more significant to focus on the effect of the 1974 amendments to the Sherman Act which made antitrust violations felonies punishable by up to three years' imprisonment and $100,000 fines for the individual businessman. As a practical matter, this criminal threat is a far more effective deterrent than an esoteric "no contribution" rule.

Furthermore, to the extent that it is a deterrent to hang the prospect of a whole industry's damages over the head of a single company, it is likely to over-deter. This over-deterrence may cause businessmen to react with excessive caution, thereby chilling legitimate aggressive, pro-competitive conduct. In United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Supreme Court recognized that such over-deterrence constitutes a very real problem. What the Supreme Court said there in rejecting strict criminal liability in antitrust cases may be equally true for near-limitless exposure to undiminished civil liability for all the damages caused by a horizontal price-fixing conspiracy:

> "[There exists] the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." Id. at 441.

For similar reasons, a contribution rule would avoid the possibility of over-deterrence and would more carefully proportion deterrence to conduct that should be deterred.

Removal of Burden on Defendant's Right to Trial

Recognition of a right to contribution would enhance the administration of justice in still another way. It would enable a company that wants to defend itself against an antitrust charge to do so. History has shown that plaintiffs' lawyers have a potent weapon to induce settlements regardless of the merits of their cases. Under a no-contribution rule, the exposure of non-settling defendants expands geometrically as other defendants settle out, leaving fewer and fewer companies to bear the brunt of a potential verdict that encompasses all damages inflicted by all participants -- trebled.

This system provides a tremendous premium for settling early, even if the charges lack real foundation. The pressure on the hold-outs then mounts intensely. Thus, while many antitrust defendants believe that they are innocent of the charges against them, and may otherwise be willing to go to the great effort and expense of actually litigating the claims against them, the prospect of having to pay a treble damages judgment that may jeopardize their survival makes it impossible to go to trial. As a result, they are forced to settle, often at exorbitant rates.

Some critics of a rule allowing contribution have argued that contribution would be objectionable because it would deter settlements. Looked at more closely, however, the argument is simply that, if plaintiffs can no longer dangle huge potential damage liability over the heads of defendants who are responsible for only a small portion of those damages, then they will no longer be able to whipsaw defendants into settling even the most questionable of claims. While there is a legitimate interest in settling cases that are fairly contestable, these whipsaw settlements are undoubtedly not the kind that should be encouraged.

Therefore, there is no merit to the argument that contribution should not be allowed because it might discourage extortionate settlements. The Supreme Court has said as much, in a related context. See United States v. Reliable Transfer Co., 421 U.S. 397 (1975). The Court was faced there with the question whether it should continue the traditional formula for contribution in admiralty cases, or should endorse a new rule that more precisely allocated liability. In adopting the new approach, the Court rejected an argument that the new rule would be bad because it would diminish the pressure on some parties to settle:

> "[A]t bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." Id. at 408.

Against this backdrop, a similar objection to establishing the simple formula for contribution set forth in S. 995 deserves similarly short shrift.

Minimal Impact on Conduct of Litigation

Another argument made against a rule allowing contribution is that it would add new procedural complexities to already complex antitrust cases, possibly undermining the plaintiff's ability to control his own lawsuit. This possibility, it is said, could result in deterring plaintiffs from even bringing legitimate cases.

But this argument is specious. Rule 42(b) of the Federal Rules of Civil Procedure authorizes trial judges to order separate trials whenever a plaintiff is prejudiced by a defendant's expansion of the suit. This device is available, if appropriate, to handle contribution cross-claims or third-party claims under this bill. As the dissent in the Abraham Construction case pointed out:

> "The district courts are certainly aware of the antitrust plaintiff's status as a private attorney general and of the important role played by the private damage action in enforcing the objectives of the antitrust laws. The special solicitude accorded these plaintiffs necessarily requires a liberal exercise of the separate trials provision. Realizing his favored position, the antitrust plaintiff is not likely to assume that the trial judge would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden. Hence, the incentive to sue provided by the treble damages action is not jeopardized if contribution is allowed." 604 F.2d at 908. */

The point here is not that separate trials will always, or even usually, be necessary. It is, rather, that federal trial judges have the tools to keep antitrust cases manageable, even with the assertion of contribution claims.

Effect on Cases Not Covered

By its language, S. 995 will apply only to price-fixing cases. Because of this limited focus, which the Roundtable supports, the Committee may want to indicate in the bill or in its report that there is no intention to prevent the federal courts from allowing contribution in non-price-fixing cases, if they conclude that it is fair, appropriate, and manageable to do so. In the recent Northwest Airlines case, the Supreme Court left open the power of the federal courts to act as "common law courts" in this area. 49 U.S.L.W. at 4389 n.42.

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*/ See also 11 J. von Kalinowski, Antitrust Laws & Trade Regulations § 81.01[1] at 81-6, speaking of "the solicitous, almost protective regard that most judges take of private [antitrust] plaintiffs."

Price-fixing cases lend themselves particularly well to a precise legislative formula, while other antitrust cases may not. S. 995 thus appropriately focuses on price-fixing cases. There is no reason, however, for this legislation to imply that the federal courts should refrain from developing and adjusting contribution principles in other contexts, if the Supreme Court holds that the courts have some reserved or inherent power to do so.

If the Committee wishes to insert a provision making clear its desire not to cut off judicial consideration of contribution claims in other types of cases, it might add to the bill a new section something like the following:

> "Section 2. Nothing in this Act shall prevent the courts of the United States from determining whether principles of contribution should be applied to cases other than horizontal price-fixing cases."

Finally, the Roundtable recognizes that, as written, S. 995 would apply only to future cases and not to pending cases. It is our understanding that proposed Section 4I(e) is intended to be neutral on the question whether the courts have power to allow contribution in pending cases in the absence of legislation and whether it is fair, appropriate, and manageable to do so in those cases. Under Section 4I(e), the legislation itself would speak only to future cases and would be silent about the outcome of pending cases.

Conclusion

On the basis of this analysis, the Business Roundtable expresses its strong support for all of the substantive provisions of S. 995, and urges the Committee to report it to the Senate with the recommendation that the bill be passed.

* * *

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May 20, 1981

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Room 209
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S.995 - A Bill To Provide for Contribution In Price-Fixing Cases

Dear Mr. Chairman:

I have the honor to submit my personal views on the advisability of enacting S.995, a bill to provide for contribution among defendants in price-fixing cases. With four years of direct and indirect responsibility for antitrust enforcement in the Department of Justice and with the additional perspective of some twelve years of private practice in antitrust law, I may by offering my personal views be able to assist your Committee by enriching the record.

I oppose mandating contribution among defendants in price-fixing cases, as provided by S.995, because the deterrent value of the treble damage remedy will be lessened, and because settlements will tend to be discouraged. To the extent that the Committee concludes that there is some risk of unfairness to small, innocent defendants who nevertheless must settle to avoid theoretical liability for an entire conspiracy, legislation permitting but not mandating contribution, in the discretion of the trial court, would be preferable.

The treble damage remedy, experience tells us, is a powerful deterrent against price-fixing activity. Knowledgeable lawyers and businessmen believe that criminal prosecution alone is inadequate to deter price-fixing.

Given that fact, any steps that would have the effect of weakening the deterrent must be subject to the strictest possible scrutiny.

Contribution, as a rule of tort law, seems out of place as applied to intentional felonious activity such as price-fixing. It is unseemly for white collar criminals to be able to plan to seek reimbursement from one another, and yet that will be the effect of S.995, were it to be enacted. To the extent potential liability can be calculated beforehand, and to the extent the potential for massive liability can be reduced in any case, regardless of wilfulness or criminal culpability, the deterrent effect of private enforcement of the antitrust laws is diminished. To that extent, mandatory contribution would seem as a policy matter inadvisable.

Furthermore, there will be less incentive to settle antitrust cases. Plaintiffs, faced with the likely reduction of the total amount to which they would otherwise be entitled, are less likely to settle. Any proposal that renders settlement more difficult in a major sector of litigation carries a very heavy burden.

I have confidence that our trial judges, permitted to apply rules of contribution to avoid extreme unfairness, can do justice. Depending on the outcome of the currently pending case in the Supreme Court that deals with the issue of contribution, Texas Industries, Inc., v. Radcliff Materials, Inc., no. 79 - 1144 (argued March 3, 1981), the Congress may wish to consider legislating a permissive, though not mandatory, contribution provision.

I hope these views are helpful.

With warm regards,

Respectively yours,

John H. Shenefield

John H. Shenefield

JHS:jws
cc: Senator Howard Metzenbaum

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May 28, 1981

To The Honorable Members of the
Committee on the Judiciary
United States Senate

This memorandum discusses the impropriety of giving retroactive effect to the proposed contribution legislation, S.995. Both this firm as a whole and the undersigned have had extensive experience in antitrust price-fixing and class action litigation over many years, including the representation of International Paper Company in the Corrugated Container litigation discussed more fully below. We respectfully request that this statement be filed as part of the record of the Committee's deliberations on the bill.

The proposed contribution legislation (S.995) would alter substantive rights and liabilities by creating a new right among antitrust defendants or co-conspirators to sue one another. It would also change the law regarding the effect of settlements in such cases on the remaining, non-settling defendants.

Senate Bill 995 specifically provides that the new legislation would apply prospectively, that is, to actions "commenced after the date of enactment." However, recently suggested changes would make the legislation applicable in whole or in part to pending cases in which judgments for damages have not yet been entered.

Any such retroactive application of contribution legislation would raise constitutional due process questions, would change established legal precedent after substantial court activities have taken place in reliance on existing law, and would create considerable uncertainty as to the status of numerous, large settlements that have been entered into in pending class action cases in which final judgments have not yet been entered against the non-settling defendants.

A. The Proposed Legislation

The proposed legislation would amend the Clayton Act to allow a defendant in a price-fixing antitrust suit to sue co-defendants in the same case, or to sue co-conspirators or joint wrongdoers in a separate suit, in order to obtain contribution to any judgment that may be won by the plaintiff. The amount of the contribution would be determined in accordance with a formula set forth in the proposed bill.

In the case of settlements, the proposal would operate to reduce the damages a plaintiff can recover at trial by the amount of the damages attributable to the settling defendants. This has been referred to as "carve-out" or "claim reduction." In this way settling defendants would be spared from a claim of contribution by non-settling defendants.

The legislation would change long-standing judicial precedent that (i) does not recognize contribution in antitrust cases, and (ii) permits a plaintiff to settle with some defendants but retain the right to recover the full amount of damages against those defendants remaining.

Other memoranda and testimony have been directed toward the policy considerations involved in changing the law in those respects. The purpose of this memorandum is to demonstrate why any such legislation should apply prospectively only.

B. If Made Applicable to "Pending" Cases, S.995 Becomes a Retroactive Bill

The suggestion that S.995 be made applicable to "pending" cases clearly seeks retroactive effect insofar as the Corrugated Container (MDL 310, S.D. Texas) and Plywood (MDL 159, E.D. La.) cases are concerned, and possibly insofar as other pending cases are concerned in which substantial pretrial activity and settlements have occurred. In both of those named cases:

- settlement agreements were executed long ago;
- the settlement money has been paid by the defendants ($320 million in the Corrugated case);
- court notices have been mailed to the classes involved (over 200,000 in Corrugated, 300,000 in Plywood) advising of the settlements;
- the district courts have held hearings on the fairness and adequacy of the settlements, giving weight to the absence of carve-out, and have approved them (on appeal in Corrugated);
- class members have submitted claim forms to the court proving their entitlement to the funds;
- in Corrugated only one out of 37 defendants elected to go to trial; the trial lasted many months and a jury verdict was entered against that defendant; the court and parties are presently engaged in determining the dollar amount of the judgment to be entered;
- similarly in Plywood, only three out of the many defendants elected to go to trial, and they lost; a partial judgment has been entered and is now on appeal to the Fifth Circuit.

Because no final judgment has been entered in those cases, they would be considered "pending" under the suggested change in S.995, and the contribution/carve-out provisions of S.995 would then apply. For these new rules to take effect now and be applied to the already concluded settlements, court approvals, class notices and jury trials in those cases -- all of which occurred on the basis of no contribution and no carve-out -- is unquestionably retroactive application of the statute.

To apply the new legislation so as to prejudice the plaintiffs in those cases, the hundreds of thousands of class members located throughout the country or the vast majority of defendants who have settled, would raise troubling questions of fairness and constitutionality of the act and would be an unwise exercise of Congressional power.

One of the plaintiffs' lawyers in those cases made clear what would be likely to happen if S.995 were applied to them. In response to a direct question on retroactivity by Senator Grassley at the Judiciary Committee Hearing on May 11, 1981, plaintiffs' counsel stated:

> "One thing we can be sure of is that there will be years of litigation during which the [settlement] money will be denied to the class members who are entitled to it. That is an additional reason why I think this bill, even if it should pass -- and I hope it will not -- should by no means be made retroactive. I think that would be a horrible situation leading to infinite complexity not only in that case but in the case of many other cases, some of which have reached the stage of Corrugated and some of which are on their way to the Corrugated stage." (Transcript p. 50)

In answer to a similar question, the Chief of the Antitrust Division of Maryland's Attorney General's office was emphatic that retroactivity would adversely affect that state's antitrust litigation. (Transcript p. 27)

C. Policy Against Retroactive Legislation

The bias against retroactive laws has deep roots in our constitutional tradition. James Madison, in the Federalist No. 44, described retroactive laws as "contrary to the first principles of the social compact and to every principle of social legislation." 288 New American Library Ed. Madison wrote:

> "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." Id.*

The aversion to legislation that applies retroactively is based on sound principle -- a general abhorrence of ex post facto laws. Our citizens should be able to act with reasonable knowledge of legal consequences and expect reasonable stability in the rights or liabilities that attach to their acts or those of others. They should not be exposed to liabilities created after the fact.

This policy is reflected in judicial precedent declining to apply retroactively judicial decisions which announce a new rule of law. For example, the Ninth Circuit has recognized that retroactive application of a newly created cause of action "would be as inequitable as ex post facto criminal liability." Weinberg v. Mitchell, 588 F.2d 275, 278 (9th Cir. 1978).

Specifically, courts have declined to give retroactive effect to contribution statutes enacted by states. See, e.g., Wesolowski v. Rhoades, 416 F. Supp. 1052, 1053 (E.D. Pa. 1976); Fraley v. Worthington, 64 F.R.D. 726, 728 (D. Wyo. 1974); United States Fidelity & Guaranty Co. v. Park City Corp., 397 F. Supp. 411, 414 (D. Ore. 1973), aff'd, 526 F.2d 1120 (9th Cir. 1975); Massey v. Sullivan Co., 464 S.W.2d 548, 549 (Tenn. 1971); Commercial Casualty Ins. Co. v. Leonard, 196 S.W.2d 919, 921 (Ark. 1946); Norfolk & So. R. Co. v. Beskin, 125 S.E. 678, 679 (Spec. Ct. App. Va. 1924).

Three provisions of the Constitution protect against retroactive civil legislation: the Contract Clause, which is applicable to the states, and the Due Process Clauses of the Fifth and Fourteenth Amendments. The legal and policy factors which have been considered in determining whether, consistent with fundamental fairness, legislation may be applied retroactively militate against retroactive application of the pending legislation.

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* For an analysis of the dangers of retroactive legislation, see testimony of Philip Lacovara, Esq., Antitrust Enforcement Act of 1979: Hearings on S.300 Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 213 (1979).

1. The Supreme Court has just rejected a rule of contribution in antitrust cases, Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (U.S. Sup. Ct., filed May 26, 1981), thus confirming the long-standing and virtually unanimous view of the lower federal courts. See, e.g, Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979); In re Beef Industries Antitrust Litigation, 1980-1 Trade Cas., ¶ 63,021 (5th Cir. 1979); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).* The Supreme Court unanimously held that Congress had neither implied a right of contribution in antitrust cases nor empowered the courts to fashion such a right as a matter of federal common law. While declining to rule on the merits of the policy arguments advanced for and against a rule of contribution, the Court took special note of the problems which such a rule would raise with respect to allocation of damages and effect of settlements, observing that:

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* The Eighth Circuit was alone among the federal courts of appeal in recently allowing a contribution claim in an antitrust case, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979). However, the case involved special facts (it was not a horizontal price-fixing case), and, significantly, even that court suggested that contribution would not be recognized as against settling defendants. Id. at 1184. Professional Beauty Supply has been effectively overruled by the Texas Industries decision.

> "Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings thus adding new complications to what already is complex litigation." Id. at 7.

The complications which will be added by permitting contribution in future cases pale in comparision to those which will result if contribution is applied retroactively to reopen trial and pretrial proceedings in substantially terminated litigations which some or many defendants have long since settled.

2. As the Supreme Court recognized in Texas Industries, id., slip. op. at 4-8, 16-17, there are competing policy considerations involved in deciding whether to create a new contribution cause of action. Contribution will result in greater fairness among defendants -- a proposition which we support. The rule of law, however, is that intentional wrongdoers should not be aided by the courts, and thus should not be allowed to sue to reduce the effect of a judgment against them. There are also varying views as to whether adoption of a contribution rule would enhance or diminish the deterrent effect of the nation's antitrust laws. In view of the conflicting opinions on these matters, if a contribution rule should be adopted, it should have prospective effect only.

3. Moreover, retroactively applying a rule of contribution to pending cases could well precipitate substantive and procedural havoc. That would certainly be true in any case where settlements have already been agreed upon. For example, in the Corrugated Container litigation, 36 of 37 defendants settled, providing a settlement fund of almost $320 million for the plaintiff class. With accrued interest, the settlement today approximates $400 million. One defendant

went to trial and lost a jury verdict on liability issues, but no judgment has yet been entered. If contribution is permitted in pending cases where a judgment has not been entered, the legislation would then be applicable in the Corrugated Container litigation, with the following results:

(a) Settling defendants who have paid substantial sums to dispose finally of the litigation, but whose settlements are still awaiting final appellate court approval, would nevertheless be exposed to a claim for contribution on the part of the one defendant that gambled, decided to go to trial and lost. Such a result would be manifestly unfair.

(b) If the claim reduction or sales carve-out provisions of the proposed legislation were sought to be applied in the Corrugated case, serious uncertainty would be created as to the status of the litigation. Even if a provision is included that would purport to protect settlements, the plaintiff class might still contend that the claim reduction or carve-out features of S.995 interfered with or frustrated the settlement agreements. Plaintiffs could argue that they had refused to agree to any claim reduction or carve-out of defendants' sales as part of the settlement negotiations; they would contend that, on the contrary, it was specifically provided in the settlement agreements that plaintiffs' full right to recover total damages would be preserved against non-settling defendants. Plaintiffs might also argue that the district court approved the settlement agreements on the understanding that the plaintiff class' right to claim full damages against non-settling defendants had been preserved. The one defendant who declined to settle and submitted its case to the jury did so with full knowledge of those facts and the exposure it was thus facing if it lost. Against this history of settlement negotiations, court approvals and the concluded jury trial, for Congress now to require claim reduction or carve-out in the Corrugated litigation could affect the value of the jury verdict obtained by the plaintiffs and the viability of the many settlements that have been reached and could raise questions as to the constitutionality of the legislation.

(c) Efforts to upset the settlements would produce even more protracted and expensive litigation. Initially there could be hearings to determine whether the settlements should be set aside. If settlements were overturned, the settling defendants either would try to settle the case again, with the required notice to the 200,000 class members and court hearings on reasonableness, or would go to trial, which took four months when only one defendant went to verdict. All of this would not only impose a heavy burden on the courts and parties but would delay for an extended period any payment to the class. There is nothing in the law or policy considerations involved in this legislation warranting such disruption and uncertainty.

(d) The one defendant who went to trial in the Corrugated case did so in order to escape liability altogether, in the hope that it would win and not have to contribute anything to the $320 million that had accumulated for the benefit of the class. While others paid substantial millions, that one defendant gambled on paying nothing and lost. We submit that in these circumstances the settling defendants should not be exposed to any additional risk, uncertainty or litigation cost. Allowing S.995 to apply to the Corrugated situation does just that. Such attempted retrospectivity should be rejected in the interests of finality and fundamental fairness to the many settling defendants who bought their peace dearly.

(e) Many other companies and individuals not currently parties to the litigation would be affected by retroactive application of the proposed contribution legislation. In the Corrugated criminal prosecution, the Department of Justice named 52 corporations as co-conspirators in a bill of particulars; 23 of these companies have not been named as defendants in the Corrugated treble damage complaints. Moreover, none of the 807 individuals named by the government as co-conspirators have been sued. If S.995 were to apply to "pending" cases, the one non-settling defendant would be in a position to name these 23 corporate co-conspirators and 807 individual co-conspirators as parties required to contribute to the judgment to be entered. The Corrugated cases have been pending for five years and an enormous amount of litigation activity has occurred. It simply does not make sense to allow additional parties to be brought in at this late stage, as the litigation is winding down. Of course, if the settlements were to be set aside, contribution claims might also be asserted among the 37 existing defendants who would be reinstated as active litigants. In short, the result of such retrospective application would be to make an already complex litigation enormously more complicated.*

(f) Should the contribution legislation be given retroactive effect, it would raise in other cases similar problems of constitutional due process and uncertainty as to the status of numerous, large settlements. In the Plywood Antitrust litigation, for example, only three of a large group of defendants chose not to settle, went to trial and lost. As in Corrugated, a number of the settlement agreements in Plywood were negotiated on the basis of no carve-out.

Congress in the past has been reluctant to enact retroactive laws, particularly in the antitrust area. For example, Section 304 of the parens patriae title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which expanded the number of plaintiffs who could sue antitrust defendants, provided that the new statute would not apply "to any injury sustained prior to date of enactment" of the Act. Significantly, Congress rejected an earlier draft of the parens patriae legislation which authorized application to actions "pending on the date of enactment" of that bill.

Similarly, when Congress enacted Section 4A of the Clayton Act, which authorizes the United States to sue for single damages in its proprietary capacity, the new authority was given only prospective effect. Section 2 of the amending legislation provided that it would become effective "six months after its enactment."

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* Many of the "pending" cases to which the legislation is sought to be made applicable have been pending for a long time. In most of these, pretrial procedures and discovery are in progress or actually have been completed. To bring third parties into these cases by way of contribution claims would raise questions of procedural fairness, since such parties would be exposed to liability but would not have had the right or opportunity to participate in discovery or other pretrial activities already undertaken.

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As the discussion above plainly reveals, there are compelling reasons against retroactive application of the contribution statute. Congress can avoid creating the uncertainities and difficult legal issues inevitably presented when it makes any legislation, and particularly this bill, retroactive. S.995 should be given prospective effect only.

Respectfully submitted,

DAVIS POLK & WARDWELL

By Henry L King
Henry L. King

STATEMENT OF ERNEST GELLHORN TO THE SENATE JUDICIARY COMMITTEE ON S. 995

I am Ernest Gellhorn, T. Munford Boyd Professor of Law at the University of Virginia Law School. My primary areas of teaching and scholarly interest are in antitrust and administrative law. I appreciate the opportunity to present my views to the Committee on whether S. 995, which would amend the Clayton Act to allow contribution in price-fixing suits, should apply prospectively only, as it now reads, or whether it should be rewritten to cover private treble damage actions pending at the time the amendment is adopted.*

After examining the reasons generally given for approval of a rule of contribution in antitrust cases, this statement examines whether these policies would be served by prospective or retrospective application. It concludes that the usual approach of limiting statutory changes to prospective application only promotes the legislation's purposes. Applying the new rule of contribution prospectively would also be fairer to litigants in pending actions. The general rule against retroactive lawmaking is consistent with public policies that favor settlements in antitrust cases and that generally require the protection of legitimate expectations.

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*International Paper Company has requested my views on the prospectivity/retrospectivity question of S. 995. However, this statement represents my views and not necessarily those of International Paper.

In fact, retroactive application of the contribution legislation would be the equivalent of a private bill. It is designed to protect a small group of defendants who are seeking through congressional action to extricate themselves from a bargain they knowingly made, namely a chance to win their case and thus pay nothing and, at the same time, to reduce their losses if they should lose at trial. I therefore believe that their efforts should not be rewarded by special legislation that converts S. 995 into a retroactive rule.

I..

Since the issue of retroactive application of a new rule for antitrust contribution is a question of timing and nothing else, this analysis of when the rule should be applied necessarily assumes that the Committee will decide to allow contribution among antitrust defendants. Thus, for purposes of this discussion it will not matter what the precise rule is, how contribution is measured, or whether it should be confined to horizontal price-fixing. (These are, of course, important issues involving sensitive problems of practical administration and policy; they do not, however, contribute to a resolution of the issue of retroactivity and are for that reason omitted.) Making the judgment that contribution among antitrust defendants is sound policy does not itself answer the question of whether to apply the new rule to actions pending at the same time this statutory change is adopted--thus threatening settlements previously reached and otherwise controlling--or whether it should be limited to actions commenced after the amendment to Sections 4, 4A, or 4C of the Clayton Act has been approved.

In deciding how to answer the question of retroactivity, a first consideration is why this legislation is being approved, and whether these underlying policies would be furthered or defeated by limiting the new rule to subsequent actions. Although many arguments have been presented about the desirability of contribution as public policy, a review of the testimony presented to this Committee during recent hearings and during the last Congress (when S. 1468, the predecessor to S. 995 was approved by the Senate Judiciary Committee) as well as of the scholarly literature reveals three primary arguments for a rule of contribution.

First, it would reform an area of law where judicial decisions are not wholly harmonious and prior legislative intent is absent. Legislative guidance on the allocation of responsibility for damages is especially appropriate where courts have applied common law rules developed for other purposes without regard to whether those purposes serve antitrust law interests and where the results can often create a policy mismatch.

Second, allowing contribution would promote economic efficiency by sending more accurate signals of deterrence to those who might otherwise violate the antitrust laws. The basic thrust behind private enforcement of the antitrust laws is to free the market of privately generated monopoly or cartel contraints. A rule of contribution among antitrust defendants may further this legislative program by allocating the costs of law violation among the violators in accordance with the "contribution" that each makes to such costs.

Third, is a related concern that contribution is required in private antitrust litigation as a matter of simple equity and fairness. Without contribution some participants in antitrust law violations do not have to bear their share of the costs they impose on society or the injuries they inflict on plaintiffs, while others are required to pay not only their share but also the shares of others. It may be, as has been argued, that neither the law nor the courts are obliged to rectify injustices inflicted on law breakers, that they should be treated as outlaws undeserving of fair and equitable treatment. On more thoughtful reflection, this in terrorem approach is unsatisfactory. It is unsatisfactory because it treats defendants differently. The distortions resulting from a rigid requirement of no contribution may impose heavy penalties on innocent parties, particularly if they are risk averse. Faced with the threat of having to bear the costs of industry-wide liability (less any settlements), some firms--particularly small businesses in capital intensive industries needing to maintain credit worthiness in order to borrow necessary funds--may be compelled to settle meritless claims. Thus, the adoption of a rule of contribution for private antitrust enforcement rests on notions basic to our legal system, that the law should seek to reach a fair result. A society founded on the rule of law should steadfastly adhere to the principle that penalties be proportional to the risks created.* Without contribution, the impact of private treble damage actions is likely to be random and arbitrary.

II.

A comparison of how the new rule of contribution would operate under prospective and retroactive standards quickly demonstrates that prospective application--as S. 995 is now drafted--better serves the policies justifying modification of the Clayton Act. Before making this evaluation, however, brief note should be taken of the framework generally applied to statutory changes.

While there is precedent that recognizes Congress' authority to apply legislation to pending cases, nonetheless, retroactive grants are unusual and have not generally been approved.+ This is particularly true where such legislation would alter existing arrangements or the reasonable expectations of the parties to litigation. Powerful or overriding reasons are necessary to justify retroactivity because the usual rule--as reflected in the Constitution (e.g., the ban on ex post facto laws, bills of attainder, contract impairments and uncompensated takings), constitutional litigation and the nation's political philosophy--is that laws should be general and not retroactive in order to protect reliance on legitimate expectations. J. Rawls, _A Theory of Justice_ 238 (1971); see Smead, _The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence_ 20 Minn. L. Rev. 77 (1936). Values of reliance and repose are central to our concept of ordered liberty and should be upset only in the narrowest of circumstances.

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*Nor is the provision of three-fold damages necessarily inconsistent with this premise. It is founded on the belief that increased damages serve to impose punishment on the defendant as well as provide an incentive (and compensation) for the plaintiff. However, trebling does make the principle of proportionality even more significant in evaluating whether to apply contribution retroactively.

+See generally, Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 694-95 (1960) ("the Court has consistently held that not all retrospective statutes are unconstitutional, but only those which, upon a balancing of interests on both sides, are felt to be unreasonable.").

Such circumstances are absent in the case of a new rule of antitrust contribution. Adherence to the usual rule of law that statutes should be applied only to future situations serves the interests of reform and reliance, economic efficiency, and fairness and equity.

Contribution is being sought for the sake of simplicity of administration and to fulfill the reasonable expectations of the participants in antitrust litigation. Limiting the new rule to prospective application provides a convenient means for determining when it applies; it would govern those actions commenced after the law was adopted and would promote reasonable reliance on a stable legal structure.* However, retroactive application of a contribution rule would modify reasonable expectations of "no contribution and no carve out" relied upon by litigants and settling parties in pending litigation.

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*The date on which the cause of action arises, itself often difficult to determine, would not be relevant under S. 995 as now written. The action commences for purposes of prospective application on the date suit is filed and a court's jurisdiction is invoked.

Moreover, extending the new rule of contribution to pending cases is likely to create more uncertainty than clarification. Specifically, retroactive application of either the "carve out" or "claim reduction" provisions -- depending on how a retroactive requirement was drafted -- could create enormous uncertainty regarding the status of many large settlements. If the retroactive provision were written to limit the liability of nonsettling defendants to their proportional share of the plaintiffs' damages, plaintiffs would be unfairly disadvantaged by this change of rules (having foregone their opportunity by settling with some defendants on a "no carve out" basis). If, on the other hand, plaintiffs were to be protected by modifying the terms of their settlements (to increase the potential liability of settling defendants), then the settling defendants are unfairly prejudiced. Whichever approach is taken, one of the participants in the settlements will be injured and will seek to protect its interests. Inevitably, then, extension of a rule of contribution to pending lawsuits will spawn a new, complex and costly area of antitrust procedural litigation as parties seek to determine the meaning and effect of retrospectivity on past settlements where suits are still pending against some defendants.

Nor is the question of the permanence of past settlements the only issue raised by retroactivity. Another difficult question courts would be forced to decide is when is a case pending and when is it no longer open. Are current cases subject to motions for rehearing or to appeal still "pending," even though otherwise binding settlements were agreed upon? Are settlements "consummated" and not subject to reopening and reversal as soon as they are agreed upon, or after being approved by courts (in class actions) or monies are paid out, or only after all related litigation is finally resolved and none of the cases is subject to change? Answers to these questions and a host of related procedural problems* will require years and much litigation to decide. They also suggest that any proposal to apply a new rule of contribution to pending cases, particularly where settlements have already been reached, would create a new arena for litigation and render the new rule almost unworkable.

Economic efficiency interests are likewise served by a rule of prospectivity. As already noted, the economic justification for allowing contribution is the need to correct the signals now being sent to those participating in or contemplating antitrust violations. Retroactive application of the law of contribution can have no effect on such behavior and thus is wholly gratuitous and unnecessary in this regard.

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*For example, the proposed legislation authorizes defendants in pending cases to bring in new parties on the theory that such parties would be liable for contribution. However, the new parties would not have participated in either discovery or pretrial procedures that have already been undertaken in the vast majority of pending cases.

Past business action still subject to antitrust scrutiny in litigation is, like sunk costs, a bygone that can no longer be retrieved or altered. Indeed, if economic principles were to be followed rigorously the new rule should apply only to a cause of action that arises (i.e., is based on business behavior) after the date of enactment. That however would be an awkward and difficult dividing line; and since most business activity is of a continuing nature, extending contribution to cases brought on or after the date this law is adopted seems a reasonable compromise.

Persuasive as these reasons are for limiting any new rule of contribution to prospective force, interests of equity and fairness ultimately present even more powerful arguments for so restricting its scope. This conclusion may seem anomalous at first blush since contribution is generally favored to overturn current rules that can result in coerced settlements and disproportionate liability. When the possibility of retroactive application is introduced, however, additional factors outweigh these considerations.

As noted, the primary effect of retrospective application of contribution legislation would be to deny plaintiffs recovery of damages they otherwise would recover or to jeopardize settlements agreed upon by defendants in pending actions. In either case, it would work to favor nonsettling defendants whose risks or loss would be reduced: if they win they pay no damages; if they lose their responsibility for damages would be narrowly limited. This result seems clearly unfair. Defendants who settled face the possibility of claims of additional liability once specifically limited by agreement with plaintiffs. Plaintiffs who settled with some defendants would now be subject to the "carve out" reducing the amount they can recover from nonsettling parties. In other words, when plaintiffs entered into their settlements they believed that any amounts they could get by litigation would be reduced only by the amount they received by settlement. But if the rule of contribution were to be applied retroactively and be subject to the carve out, plaintiffs damage awards would be reduced by the amount of the damages attributable to the settling defendants. Upsetting these agreed upon settlements to favor defendants who chose not to settle seems neither just nor fair to plaintiffs or settling defendants. Reallocating these risks after the fact does not seem warranted merely to protect the needs of nonsettling defendants. They chose not to settle knowing the risks they faced.

The unfairness and one-way nature of the proposed retroactive application would put the favored nonsettling defendant in a heads-I-win, tails-you-lose position. That is, if the nonsettling defendant wins, a rule of retroactivity would have no effect; he would pay nothing and the settling defendants would still be bound by their settlements. But, if the nonsettling defendant loses the lawsuit, retroactivity of the carve out would limit his liability and might be used in an effort to jeopardize the settlements made by many defendants since the plaintiffs may seek to argue that the settlements are no longer valid.

* * *

Amendment of the Clayton Act to permit contribution in price-fixing suits involves a major change in the rules governing private antitrust actions. It is designed to promote settlements and serve the goals of the antitrust laws as well as to assure fairness to the litigants. Applying the rule prospectively works to achieve these ends. On the other hand, applying the new rule to pending litigation can have no effect on past conduct. But it does change the rules of litigation in the middle of the contest. Such a result seems both anomalous and unjust. It would favor some litigants at the expense of others. The manifest injustice of retroactivity seems obvious. For these reasons I urge that the Committee not rewrite S. 995; its effect should be prospective only.

Sincerely,

May 15, 1981

Ernest Gellhorn

Ernest Gellhorn
T. Munford Boyd Professor
of Law

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUN 9 1981

Honorable Strom Thurmond
Chairman, Committee on
  the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I would like to take this opportunity briefly to expand upon my prior testimony concerning S. 995, a bill to provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

As you know, I testified that contribution is, in principle, a logical solution to a number of perceived inequities and abuses in private antitrust damage litigation, but that it presents in practice extremely complex problems, including issues of equity, deterrence, litigation management, and effective use of judicial resources. I further testified that I was predisposed to favor some form of contribution legislation although I was reluctant to endorse S. 995 in its present form, primarily because it places its major emphasis on horizontal price-fixing violations where the equitable arguments for contribution--at least with respect to those who have knowingly engaged in cartel-type violations--are weakest. S. 995 provides little relief for defendants in other types of antitrust cases where the equities more strongly favor contribution. Since my testimony, the Supreme Court has rendered its decision in Texas Industries, Inc. v. Radcliff Materials, Inc., No. 79-1144 (decided May 26, 1981), holding that only Congress may provide rights of contribution in antitrust litigation; none may be implied by the courts. In light of that decision, I think it particularly important that contribution legislation be carefully drafted to provide rights of contribution in all of those cases where it would be equitable to do so.

One possible reason for limiting contribution legislation only to price-fixing violations, expressed during the Judiciary Committee's hearings on S. 995, is the apparent ease of apportioning damages among co-conspirators on the basis of sales. I am not convinced, however, that contribution legislation should be limited to price-fixing conspiracies for that reason.

First, it should be noted that application even of the formula embodied in S. 995 may present significant difficulties in some circumstances. In a classic horizontal price-fixing agreement among competitors, the relative sales contribution formula in S. 995 would appropriately apportion damages in a manner that roughly corresponds to the overcharges received by the various co-conspirators. However, that formula would not easily apply to bid-rigging violations, which are another form of horizontal price-fixing conspiracy, because certain conspirators in bid-rigging schemes may make neither sales nor purchases. In vertical price-fixing cases, where conspirators at various levels of the distribution chain each participate in sales of the identical price-fixed item, a contribution formula based on sales of the price-fixed good or service would not apportion damages on the basis of overcharges received, and thus would no longer satisfy the rationale behind the relative sales formula, which is generally to equate damages paid with benefits received.

Second, although I have not reached any definitive conclusions, it may be possible to craft workable formulae for bid rigging, non-price horizontal violations, and vertical violations of all types. For example, formulae might be devised based on relative market shares or relative participation (perhaps based on some measure of value added) at the various vertical stages of the manufacture and/or distribution of a product or service.

In sum, my enthusiasm for S. 995 would be enhanced considerably--notwithstanding the uncertainties I have expressed--if the contribution right could be generalized to those antitrust cases outside the price-fixing sphere.

I hope that these views will be helpful to the Committee in its consideration of contribution in antitrust.

The Office of Management and Budget has advised that there is no objection to the submission of these views from the standpoint of the Administration's program.

Sincerely yours,

William F Baxter

William F. Baxter
Assistant Attorney General
Antitrust Division

Chamber of Commerce of the United States
HILTON DAVIS, VICE PRESIDENT
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1615 H STREET, N.W.
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June 12, 1981

The Honorable Strom Thurmond
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Chamber of Commerce of the United States, the world's largest business federation, supports S. 995, a bill that would provide fair apportionment of liability among business firms charged with price fixing. Fair apportionment of liability is especially important to the small business firms which make up a great majority of the Chamber membership. Indeed, more than 96 percent of our member companies employ fewer than 500 people, almost identical to the percentage of small businesses in the total economy. Most of these simply cannot afford to stand on principle against the massive claims for antitrust treble damage liability so prevalent in the courts today.

In brief, S. 995 would correct the unfair rule that all participants in an alleged price-fixing conspiracy do not have to contribute toward the payment of treble damage claims. As announced by the Supreme Court on May 26 in the Texas Industries case, a single defendant can be made to pay the entire amount -- leaving other participants in an alleged price-fixing scheme free of liability. Alternatively, under S. 995:

1) All conspirators would have to contribute toward damage payments according to their shares of illegal sales or purchases; or

2) Where some of the alleged conspirators settle out of court, damages caused by their illegal activities would be excluded in calculating the liability of other alleged conspirators.

Passage of the bill would not only bring about fairness among defending companies, but would also help restore a sense of balance and perspective to the treble damage enforcement device. As matters now stand, the antitrust goals of protecting competition and promoting consumer welfare seem to be of secondary importance. Litigation tactics putting defendants at artifical disadvantage -- playing one against another -- have taken over as the paramount concerns.

Much of the lost focus follows from past tendencies to arm antitrust plaintiffs with weapons beyond the needs of an effective enforcement system. In the history of our antitrust laws, no aspect has received more legislative attention than Section 4 of the Clayton Act, the provision authorizing damage actions against alleged violators.

Since its enactment in 1914, this section has seen eight subsections added to its original language; other amendments to the original section and to some of the added subsections have also found their ways into the law. In most cases, changes have been for the purpose of making it harder for business firms to defend against claims for damages. Notable among recent amendments giving advantage to plaintiffs have been parens patriae in the Hart-Scott-Rodino Act of 1976, and the pre-judgment interest and collateral estoppel provisions in the Antitrust Procedural Improvements Act of 1980. Had it been enacted, the Illinois Brick legislation, which occupied so much time during the 95th and 96th Congresses, would have added even further to defendants' potential liability.

The result has been a legal atmosphere lacking neutrality and overtly favoring treble damage plaintiffs. Even the "no contribution" rule -- which on the surface is only a problem of fairness among defendants -- is part of the pattern. It enables a plaintiff's attorneys to capitalize on the unfairness and force defending companies to seek escape on the best settlement terms they can get.

In the not atypical case charging numerous firms with price fixing, tactical maneuvering built around the no contribution rule starts early -- before any serious look by the court at the substantive question of guilt or innocence. The first tactical goal of a plaintiff's attorneys is to arrange financing of the operation. This they can do by finding a defending company willing to settle for a sum only modestly related to its total share of alleged liability. The plaintiff's attorneys then have the funds to proceed against the other defendants, and at very little risk. The total claim is reduced only by the settlement amount and not by reference to the settling company's share of illegal sales or purchases. The settling company is happy too; it may not be guilty, but it escapes the risk of high potential liability at low cost, much like paying the premium on an insurance policy.

The second tactical goal is to build up pressure on defending companies still in the case, and that is present from the beginning. As one company settles and gets out, the odds against those remaining in goes up, until at last a single company could find itself facing the whole thing. Panic could set in, bringing on something of a race by defending companies to pay up early at the lowest possible cost. Adding to the pressure in some instances is the likelihood that all participants in the alleged scheme may not be sued. For one reason or another, the plaintiff's attorneys may choose to leave some of the conspirators out, but the damages caused by their participation (multiplied by three) would be included in any final award -- and payable by others.

The inequity of this legal policy favoring one set of litigants against another -- especially as it affects small business -- is clear from examples cited in this Committee's report on a predecessor bill in the 96th Congress. Where an innocent small firm, for instance, is forced to pay $5.5 million to preserve its credit and avoid potential liability counted in the billions, "inequity" is one of the more moderate descriptive terms.*

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* Senate Report No. 96-428, describing experience of Green Bay Packaging Company.

With the *Texas Industries* decision, legislative relief against future inequities of this sort is now more compelling than before. Until that action, there was some prospect for a case law contribution rule, but as the Supreme Court suggested, we are dealing more with a policy than a legal issue, and it is for Congress to provide the policy setting as a basis for future legal interpretations.

Actually, a policy decision to make a right of contribution part of the law should be one of the easier choices for the 97th Congress. The hearing records on S. 995 and its predecessor in the 96th Congress both show a need for equity among defendants. And, S. 995 would allow this without any change at all in the substantive rights of treble damage plaintiffs. Admittedly, attorneys for treble damage plaintiffs might not have the same built-in tactical advantage that they now exploit, but with impartiality as a goal of the legal system, that should not be a policy problem.

We are gratified that you and your colleagues on the Judiciary Committee -- Senators Baucus, DeConcini, Heflin, Hatch and Laxalt -- have taken the lead in sponsoring S. 995, and we urge its adoption.

Cordially,

Hilton Davis

Hilton Davis
Vice President
Legislative and Political Affairs

cc: Committee Members
Staff - Vinton D. Lide
Peter Chambris
Steve Cannon
Michael Cooper
Herman Schwartz

FEBRUARY 12, 1982

STATEMENT OF CONSOLIDATED OIL AND GAS, INC.

INTRODUCTION

I am David Wilson, Vice President of Corporate Development and Compliance for Consolidated Oil & Gas, Inc. ("Consolidated"). I have been with the company for five years. I am not an attorney, but my experience in the oil and gas industry generally and my present position with Consolidated have acquainted me with the need for reform of the current law concerning contribution among defendants in antitrust actions.

Consolidated is a Colorado corporation which has been in existence since 1952. Its gross revenues for its oil and gas business for fiscal year 1981 were approximately $41 million. The company is engaged primarily in the production of crude oil, condensate and natural gas, as well as the acquisition and development of leasehold interests in oil and gas properties. Consolidated owns various interests in oil producing and natural gas wells located in the states of Arkansas, Colorado, Illinois, Kentucky, Indiana, Kansas, Louisiana, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Wyoming and two Canadian provinces.

It is Consolidated's interests in the San Juan Basin, New Mexico that have brought it into contact with the Clayton and Sherman Acts as a defendant in a civil suit. That lawsuit exposes Consolidated to a potential liability in excess of its entire gross revenues for last year. The suit will be discussed in great detail subsequently. Consolidated's experience is just one more example of the need for S.995 and the need for it now.

Thus, Consolidated wishes to voice its support for S.995 and to urge that the bill be amended to specifically apply both to prospective cases and to cases now pending. Consolidated's present involvement in a civil antitrust suit, as one of five original and one of three non-settling defendants, places it in a particularly strong position to evaluate the pros and cons for both plaintiffs and defendants of applying S.995's contribution and claim reduction provisions to pending actions. It is Consolidated's position that, contrary to some of the testimony that has previously been presented to the Judiciary Committee, applying S.995 to pending suits presents no constitutional problems, imposes no risk to any pending litigation or settlements, and would not necessitate additional undue litigation to determine market shares among defendants. Further, Consolidated believes that the fundamental fairness which calls for applying S.995 prospectively mandates that it also be applied to pending actions.

APPLICATION OF S.995 TO PENDING CASES IS CONSTITUTIONAL

I understand that there is no legal impediment to applying S.995 to pending cases. My counsel advises that it is basic hornbook law that statutes which relate to procedures or remedies and which do not affect matters of substance may be made applicable to cases pending at the time of enactment.[1] In numerous cases, a newly enacted statute was applied to a pending case because it was merely procedural or remedial. "A statute is procedural or remedial if it relates to remedies or modes of procedure which do not create new or take away vested rights but only acts in furtherance of a remedy or confirmation of rights already existing."[2] S.995 is strictly remedial in nature. It in no way affects substantive antitrust law. It merely provides antitrust defendants with the opportunity to seek contribution against other defendants.

The one exception to the general rule that procedural and remedial statutes are to be applied to pending cases is if to do so would "work a manifest injustice by destroying a vested right."[3] In such a case, relief may be granted by a court. Thus, while S.995 has been carefully drafted to avoid disrupting any vested rights (since it does not allow a non-settling defendant to sue a settled defendant) the courts would step in and impose a bar to applying S.995 to a pending case if to do so would work a manifest injustice to a party.

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[1] Portley v. Grossman, 444 U.S. 1311 (1980); Turner v. United States, 410 F.2d 837,842 (5th Cir. 1969); Grenier v. United States Internal Revenue Service, 449 F.Supp. 834,842 (D. Md. 1978); Jorae v. Clinton Corp. Service, 465 F.Supp. 952 (E.D. Mich. 1979).

[2] Jorae, supra, 465 F.Supp. at 955.

[3] Koger v. Ball, 497 F.2d 702,706 (5th Cir. 1974).

Consolidated notes that an amendment to S.995 has been proposed which would also allow a court to determine that in a particular pending case application of the contribution principle would be manifestly unjust.[4] While Consolidated sees no harm in such an amendment, we believe it is probably unnecessary and redundant. It should be pointed out, however, that a plaintiff, merely by filing a lawsuit, does not have a vested right to a recovery of a certain size. Although a plaintiff may contend that it entered into a settlement with one or more defendants on the assumption and expectation that remaining defendants would be liable for the entire overcharge and treble damages, the plaintiff has no vested right to such a recovery. The plaintiff must still win the case before any right to damages vests. Since S.995 may modify a plaintiff's ultimate recovery, but does not bar a recovery should the plaintiff prevail, no vested rights of a plaintiff in a pending case are affected.[5]

PENDING SETTLEMENTS ARE NOT AT RISK

S.995 will not upset existing settlements. The bill clearly states that any defendant who has entered into a good faith settlement is relieved from liability for contribution to any other defendant. The bill would not re-open any of these settlements. Certainly a defendant who has entered into a settlement agreement in a pending case could have no cause to complain since he is immune from suit from his co-defendants.

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[4] Although proposed, this amendment has not yet been introduced. See, Antitrust & Trade Regulation Report, October 8, 1981.

[5] See, e.g., Jorae, supra, 465 F.Supp. at 956.

Obviously, a plaintiff who has entered into a settlement with one or more defendants may be concerned with S.995's application to that lawsuit because the bill's claim reduction provision could possibly result in a smaller recovery for the plaintiff. Consolidated cautions the Committee, however, against being misled into believing that such a plaintiff will be suffering any loss, much less a grevious and unfair loss.

In the past, the policy of no-contribution has provided a plaintiff with a strong tactical advantage over the defendants sued, regardless of the merits of the plaintiff's claims. The no-contribution rule contains within it a tremendous incentive for a defendant to settle, whether guilty or not, and to settle quickly, rather than face mind-boggling litigation costs and exposure to single-handedly bearing the brunt of a treble damage judgment against all members of the relevant market. This Committee has already heard a substantial amount of testimony demonstrating that the no-contribution rule has given a plaintiff the power to force defendants into accepting successive settlements at constantly spiraling prices rather than accept the risk of incurring liability for the treble damages of an entire industry-wide conspiracy.

Even if the plaintiff's recovery in a pending suit were now theoretically reduced by the settlors' share of the market rather than by their actual settlement amounts, the plaintiff has already had the benefit of having the upper hand in settlement negotiations and of inducing defendants to settle on the plaintiff's terms. It may well be that in the future, under S.995, a plaintiff will seek to obtain higher settlements, i.e., those amounts which approximate the treble damages attributable to each defendant, but it is also likely that innocent defendants will feel less pressure to settle and be more willing to litigate their innocence. Thus, plaintiff's claims of unfairness should S.995 be applied to pending cases are of little merit. Plaintiffs in pending cases have already had the unfair benefit of a strong and coercive settlement bargaining chip, a power a future plaintiff should not have.

DETERMINING MARKET SHARES WILL NOT REQUIRE ADDITIONAL LITIGATION

Testimony has been presented to this Committee indicating that S.995 would result in additional litigation, involving both settled and non-settling defendants, to determine the market shares of each so that the court could determine the total amount by which a plaintiff's recovery should be reduced to compensate for the settled claims.[6/] This is wholly untrue.

First, as this Committee has been told in prior testimony, in the past, market shares have often been used by plaintiffs to determine the settlement price for defendants. For example, in the Corrugated Container litigation, settlements were

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[6/] _See_, _e.g._, Statement of Lowell E. Sachnoff, May 8, 1981.

reached with defendants for a set dollar amount per percentage point of the defined corrugated container market and, of course, that dollar amount per percentage of the market increased with each new settlement.[7] Obviously, then, plaintiffs either have had access to information regarding market shares or have had little or no trouble obtaining such information.

Second, where market shares are not determined or agreed upon before a trial, that question necessarily arises during a trial. In order to establish damages, plaintiffs will have to prove the sales of the defendants. Determinations of the particular market and of the damages attributable to a conspiracy are therefore essential findings in antitrust cases. A determination as to shares of the market held or the sales made by each defendant would not involve vast amounts of additional litigation.

FAIRNESS MANDATES THAT S.995 APPLY TO PENDING CASES

The basis for S.995 is the need for fundamental fairness. The present no-contribution rule allows the entire burden of restitution for damages for which two or more parties are responsible to fall on a single party. Because of the huge liability risks to defendants, the no-contribution rule also permits a plaintiff to obtain separate settlements, each of which would undoubtedly be highly favorable, from one or more defendants regardless of the merits of its claim. Both of these unfair situations will be mitigated by S.995 and there is no reason why that mitigation should not begin with the cases now pending before the courts. As noted earlier, a plaintiff in a pending case has already had the benefit of a strong bargaining hand. Any decrease in a plaintiff's potential recovery is likely to be minimal. At the very least, the situation of a plaintiff in pending cases is comparable to the new situation a future plaintiff will find itself in when defendants, armed with the knowledge that they can seek contribution, will be able to more realistically evaluate the likelihood of "success" based upon the true merits of the case rather than upon the coercive influence of a potential joint and several liability. Under S.995, more defendants in the position Consolidated finds itself in today will be willing to risk going to trial to establish their innocence.

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[7] See, Testimony of Richard L. Johnson, Chief Executive Officer of Menasha Corporation.

It is worth noting that one of the most debated questions about this contribution legislation will not be affected at all if S.995 is applied to pending litigation. That is the question of deterrence. In prospective cases, permitting contribution would affect deterrence in two ways: It would increase the number of defendants subject to liability and it would realistically apportion that liability among the guilty. On the other hand, the no-contribution rule accomplishes deterrence by imposing higher cost risks on each defendant. It may well be that the no contribution rule and the allowance of contribution have an equal deterrent effect. Consolidated believes that the trebling aspect of antitrust judgments is in itself a sufficent deterrent under either rule. In any event, as far as pending cases are concerned, the deterrence level has already been set and cannot be altered by S.995.

Additionally, should S.995 be passed without a provision applying it to pending cases, there could be a rush to the courthouse by plaintiffs who fear a loss of their power to coerce settlements. This possibility is especially likely if a plaintiff does not have a strong case. Such a plaintiff should not be permitted to take advantage of the present pro-plaintiff bias of the no-contribution state of the law in antitrust cases.

CONSOLIDATED'S PREDICAMENT DEMONSTRATES THE NEED FOR S.995

Consolidated's present situation demonstrates overwhelmingly the need for S.995 and why it should be applied to pending lawsuits. As one court has so aptly noted,

> The common law rule prohibiting intentional wrongdoers from seeking contribution developed long before the evolution of multiparty litigation involving class plaintiffs, numerous defendants, vast monetary claims, lengthy trials and enormous litigation costs. The disallowance of contribution in the context of such modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation,

> pay a settlement amount rather than defend the action.[8]

Ours is an exceedingly complex suit. We have been sued by the Public Service Company of New Mexico, a producer and distributor of electricity. The plaintiff contends that Consolidated, three other producers, and a distributor, as well as two subsidiaries of one of the companies, contrived an earlier lawsuit in order to use the court system as a mechanism to artificially fix the price of intrastate gas. That earlier lawsuit, known as "the Producer Litigation," involved the question of the correct price for gas purchased at the well head by Southern Union Company, the distributor defendant in the pending action. In 1974, Southern Union had resisted the demands of producers for a single higher price for their gas. In response to Southern Union's refusal to pay the price demanded, Consolidated, among other producers, filed suit seeking to establish a fair market value price for the gas. Ultimately, the Attorney General of New Mexico intervened on behalf of the State and its consumers and asserted antitrust violations by both Southern Union and the producers suing Southern Union. The Public Service Company of New Mexico, the plaintiff in the lawsuit now pending against us, also intervened. Eventually, after a partial summary judgment in the district court in favor of Southern Union and while an appeal was pending in the state Supreme Court, Southern Union settled the lawsuit. The Public Service Company now contends that this settlement was an antitrust violation and is suing both Southern Union and the producers. This case is just one of six related cases involving allegations of price fixing in the San Juan Basin. Consolidated stoutly denies any antitrust violation as a result of the settlement or any other matter.

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[8] Huddleston v. Herman & MacLean, 640 F.2d 534,558 (5th Cir. 1981).

The two defendants who have settled out of the pending case represent approximately 83 percent of the relevant market. The first settlor did so for $8 million. The second company settled a month later for $13 million. We believe so strongly in our innocence that we have decided to litigate despite the tremendous potential liability to the three of us left in the suit. The plaintiff's complaint asks for at least $50 million in damages, trebled. Under the present state of the law, should the plaintiff prevail, and establish actual damages in the amount of $50 million trebled, or $150 million, the three remaining defendants would be jointly liable for $129 million ($150 million less the $21 million in settlements). The plaintiff could then elect to proceed against one or all of defendants found guilty for part or all of the $129 million. (It should be noted that Consolidated's gross revenues from the intrastate sales in the San Juan Basin, the only subject of this suit, were only $1.59 million in 1980 and $1.97 million in 1981.) However, if S.995 were applicable to our case, the liability of the remaining three defendants would be considerably less -- although still quite substantial -- because we would be liable only for 17 percent of

$150 million or $25.5 million. Since Consolidated has approximately seven percent of the market, our potential liability under S.995 could be about $11 million. Consolidated should not be further penalized for choosing to defend itself against what it believes are untrue allegations.

Consolidated urges the Committee to take this opportunity to correct immediately the grossly unfair situation in which Consolidated and many others[9] find themselves as a result of an antiquated rule against contribution in antitrust cases.

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[9] According to the testimony of Charles B. Renfrew, the preliminary results of a survey he has conducted indicate that as many as 2,500 companies are currently involved in 1,654 antitrust cases.

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PERSONAL AND CONFIDENTIAL

February 18, 1982

Honorable Strom Thurmond
Chairman, Senate Committee
on the Judiciary
209 Russell Senate Office Building
Washington, D.C. 20510

Re: S.995 - Retroactivity of Contribution and Claim Reduction in Antitrust Damage Litigation. Georgia Pacific Corporation Pleaded Nolo Contendre to a Criminal Anti-Trust Indictment Involving Price Fixing In the Plywood Industry in 1958, ten years before they began their illegal conspiracy in the present Plywood case.

Dear Senator Thurmond:

You will recall that during my testimony before the Senate Judiciary Committee on Wednesday, February 10, I challenged the constitutionality of adopting the retroactivity amendments to S.995 proposed by the Georgia Pacific Corporation, Mead Corporation, and Weyerhaeuser Company.

I referred to these corporate proponents of retroactivity (page 15 of my testimony) as "corporate antitrust violators" and (page 17 of my testimony) as "known price fixers."

When I "departed" from the pages of my prepared text I emphasized to the committee that these corporations, (who are asking the Congress to legislatively overturn judgments for my clients returned by juries and confirmed by the highest courts in their circuits), were appearing with "dirty hands." I advised the Committee that they had repeatedly violated the antitrust laws of our land and that they had pleaded Nolo Contendre in criminal antitrust proceedings brought by the Department of Justice.

At the conclusion of the hearing, former Attorney General Griffin Bell, counsel for Georgia Pacific Corporation, rose to challenge my statement with respect to Georgia Pacific Corporation. He stated to the committee that I was incorrect in my reference to his client. He told you and the Comittee that Georgia Pacific Corporation had not pleaded Nolo Contendre in a Criminal Proceeding including a violation of the antitrust laws. He insisted that I retract my statement with respect to Georgia Pacific Corporation.

At this point, since I was not absolutely certain of my facts, I agreed to expunge my remarks about Georgia Pacific from the record subject to my right to review the records of the Department of Justice and file a supplemental statement with the Committee.

I have reviewed the records of the Department of Justice. I was correct. Mr. Bell was in error.

I hereby file with your committee a complete schedule of antitrust charges and the dispositions thereof brought by the U.S. Department of Justice and the Federal Trade Commission against Georgia Pacific Corporation, Mead Corporation, and Weyerhaeuser Company since 1957. This file includes a phostatic copy of the U.S. Department of Justice File 5/27/57 #1341 containing a criminal indictment brought by Attorney General Herbert Brownell and returned by a Federal Grand Jury sitting in the Eastern District of Michigan in May, 1957, against Georgia Pacific Corporation and nine corporate co-conspirators charging "Price Fixing, Collusive Bidding, and Uniform Discounts" in the Plywood Industry. The file also contains the fact that Georgia Pacific Corporation pleaded Nolo Contendre to this criminal charge on September 30, 1958, and paid a $5,000 fine.

It should be especially interesting to you and members of the Committee that the very civil jury verdict returned in New Orleans in 1978, which Georgia Pacific now asks you to legislatively abrogate by making S.995 retroactive, involved price fixing in the Plywood Industry. Only ten years after Georgia Pacific Corporation pleaded Nolo Contendre (1958) and paid a $5,000 fine for price fixing in the Plywood Industry they were back at it again, illegally fixing prices on a nation-wide basis in 1968.

I sincerely hope that the Judiciary Committee of the United States Senate does not establish the congressional precedent that regardless of a jury verdict in a U.S. District Court and an affirmance in a U.S. Court of Appeals, that a major business defendent who wants another day in court can apply to the U.S. Senate for a retroactive bailout. This would be particularly egregious where the major defendants and supplicants for the bailout are known price fixers with criminal records such as Georgia Pacific, Weyerhaeuser and Mead.

Sincerely,

Joseph D. Tydings
Co-Lead Counsel - Plywood Antitrust
1973 - 1982

Enclosures
cc: Honorable Griffin Bell

GREEN BAY PACKAGING INC.

BERNARD H. SCHRAMM
GENERAL COUNSEL

[illegible] 1982

February 19, 1982

The Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
2226 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Chairman Thurmond:

Mr. Donald F. Kress and I have just returned to the office after being gone for several days on business. Upon our return, I had an opportunity to review the transcript of testimony presented to your Committee on the Judiciary regarding S.995 at the February 10, 1982 Hearing.

Since returning from Washington, I have reviewed with our trial counsel the details of the involvement of Green Bay Packaging Inc. and, in particular, its Chairman, Mr. George F. Kress, in the Corrugated Container Antitrust Criminal and Civil Actions. Your attention is invited to page 112 of the transcript of testimony at the February 10th Hearing wherein Mr. Susman states beginning at line 17 "...and three of those managers, including Mr. George Kress himself, informed us that if we took his deposition, he would invoke the 5th Amendment and decline to answer questions about pricing communications. That is the kind of innocence that caused Mr. Kress to pay $5.5 million." While our corporation has been involved with Mr. Susman for some time in the Corrugated Container Antitrust Actions, and we should, therefore, by now be accustomed to such false and misleading statements, we nevertheless feel compelled to point out to the Committee as follows regarding Mr. George Kress' involvement in the Corrugated Container Action:

Mr. Kress has never been requested to testify, give his deposition, or answer any questions regarding pricing communications or otherwise in this matter. At no time has Mr. George Kress ever responded to a request to testify by the Plaintiffs in the Corrugated Container Actions in a manner that would lead Plaintiffs' counsel to believe that Mr. George Kress would exercise his constitutional rights as guaranteed all U. S. citizens under the 5th Amendment to the U. S. Constitution. Mr. Kress has never been requested to testify.

Mr. George Kress has twice before voluntarily testified before this Committee to relate his experiences under the present Antitrust Law and to urge that remedial steps be taken to correct some of the inequities therein. This remedial action is still required in our opinion, and misleading statements such as those made by Mr. Susman only serve to create a fog around the real issue addressed by S.995- a needed change in the Statutes.

Thank you for this opportunity to correct the misstatements and to present our views. If any additional information or testimony is required, we would be happy to furnish same.

Yours very truly,

Bernard H. Schramm

BHS:bps

cc: Senator Birch Bayh
Mr. William J. Hunter, Jr.

STATEMENT OF MICHAEL H. KING
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Mr. Chairman and members of the Committee: my name is Michael H. King and I am a member of the law firm of Ross, Hardies, O'Keefe, Babcock & Parsons in Chicago, Illinois. I represent Consolidated Packaging Corporation, a defendant, in the Corrugated Container Antitrust Litigation known as MDL 310 currently pending in the United States District Court in Houston, Texas, before Judge Singleton.

Thank you for allowing me to submit this testimony on Senate Bill 995 — legislation intended to allow persons who may be liable for horizontal price-fixing to claim contribution of damages against other persons who may be similarly liable. I would like to address only the issue of proposed modification of Section 41(e) of S.995 as raised in the March 23, 1981 Eckert, Seamans, Cherin & Mellott draft revisions (Eckert) and in the proposed Mead Corporation amendment to provide retroactive application of the contribution legislation to pending actions either fully or limited to the "carve-out" theory. As a practicing antitrust and trial lawyer, I strongly urge that any retroactivity modification be rejected. Retroactivity would wreak havoc in numerous pending antitrust actions by disrupting the finality of settlements already reached and by reopening issues that have been laid to rest.

Retroactive application of the contribution legislation would be particularly inappropriate because partial settlements in pending actions have been based on many factors besides money as a function of market share. Cooperation of witnesses, ability to pay, production of documents, assistance in certification of a class, time of settlement and other similar non-cash considerations have played a historic role in the resolution of such cases while S.995 as proposed removes all factors other than money as a function of market share from horizontal price-fixing cases. Thus, retroactive application of the contribution legislation might result in recomputing or at least reexamining, on an entirely different standard, settlements which did not "carve-out" sales and which were predicated on considerations other than sales, market share or culpability.

Let me give you one example to illustrate the potentially drastic impact that any retroactive application of a contribution bill may have on pending litigation. The Corrugated Container Litigation includes numerous class action and non-class action cases involving an alleged agreement to fix prices of corrugated containers and sheets nationwide during an 18 year period. Thirty-six of the thirty-seven defendants in the class action cases have settled, providing a settlement fund of more than $320,000,000.00

for the class members. One defendant, the Mead Corporation, has gone to trial and lost a jury verdict on the issue of liability; however no judgment has yet been entered. The litigation is still pending and quite active. Several of the settlements have received final approval from the court (including that of my client) and others are awaiting such approval. Thus, retroactivity would obviously be applicable to this litigation.

Representing a quite small defendant, I settled the class litigation with substantial recognition for non-monetary factors which were of great assistance to the class. Included among those factors were non-returnable aspects such as: waiver of attorney-client privilege on certain matters, interviews of cooperating witnesses beyond the requirements of the Federal Rules of Civil Procedure, enlistment of the cooperation of witnesses, assistance in discovery, waiver of certain objections to matters affecting discovery, production of trial witnesses and other kinds of corporate cooperation which materially and permanently reduced the ability of the company to defend itself if the settlement was set aside. A "market share" settlement may well have forced my client, at the least, to undergo very great financial hardship. The ability of a small defendant to trade in the traditional currency of case resolution was properly utilized in this case to the benefit of both the class and the settling defendant.

An important additional part of my client's settlement was that its "market share", as well as the "market shares" of the other settling defendants, was left in the pot available to the class. The class representatives would not agree to a provision lifting out our sales, and settlement could not have been achieved if we, and the other settling defendants, did not give in on this issue. Judge Singleton, in fact, explicitly referred to this aspect of the settlements in giving them final approval.

Contribution, if applied retroactively, would provide no recognition of our settlement's various aspects (cooperation of the kind we provided has been approved in class action settlements before — particularly when the settling and cooperating defendant is relatively small with a restricted "ability to pay"). It would subject my client not to the peace for which it bargained but to a certain application of a formalistic and rigid "market share equals dollar share" responsibility for a potential judgment estimated as perhaps as much as a billion dollars. The price of such conformity is an individual company's ability to decide its own approach and therefore its own fate — just as Mead did in deciding to stand alone and go to trial (with full knowledge of the stakes and the risks).

Although S.995 attempts to insure in section 4I(c) that contribution may not be sought against settling defendants,[*/] class plaintiffs may well complain that changing a critical aspect of the agreements of settlement has substantially changed their bargain, since the class settlement agreements specifically provide class plaintiffs with the full right to recover damages against nonsettling defendants. Plaintiffs may view the settlement agreements as abrogated by retroactive application of the contribution legislation and therefore seek to rescind them. If that should occur, the settlements may have to be reconsidered by Judge Singleton and may require a new notice to be sent to the tens of thousands of members of the class informing them of a change in a material condition of the settlements. This, in turn, may well allow an additional "opt-out" election for the class. Whether or not any of these procedures would be invoked ultimately, the practical consequence would certainly be to set the litigation back a number of years, requiring substantial additional expense by the class and the defense and placing the finality of the settlements in great doubt.

In addition, as in most multidefendant antitrust actions and as specifically contemplated by the Manual For Complex Litigation, the defendants in the Corrugated Container Litigation have shared information and planning for the defense of the action through joint defense efforts. These discussions between co-defendants would not have taken place if contribution had been the rule. Allowing contribution retroactively where co-defendants have freely exchanged information in pending litigation based on the longstanding law of no contribution would thus unfairly prejudice defendants who have freely shared information with co-defendants now able to bring a contribution action against them.

As a practicing lawyer in the field of antitrust law, I have based my decisions on settlement and trial strategy on the present law which does not allow contribution among co-defendants. Numerous antitrust actions are presently pending involving multiple defendants where companies have made choices based upon the present law.

[*/] There are substantial questions raised by the proposed language, both definitionally and constitutionally. For example, is a "consummated" settlement one which has been preliminarily approved; which has been submitted to the class; which has been given final approval; where the time to appeal has expired; where the settlement is on appeal; where the money had been distributed to the class; where the consideration has been used, in whole or in part, for the class; where the settlement has been fully funded (recognizing some settlements provide payment over time or options exerciseable in the future); or where any residuary consideration remains after partial distribution. Similarly, retroactive legislation may well be constitutionally impermissible where the legislation substantially changes the nature and terms of a contract (which of course is the essential nature of a settlement agreement) without the approval or even participation of either party to the contract after both parties have relied on the contract; changed their positions, perhaps irrevocably; and had a federal district court and circuit court of appeals sanction the contracts.

Changing the law of contribution in midstream will adversely effect the decisions of both plaintiffs and defendants and will result in substantial chaos and relitigation, including unnecessary and unwarranted increased litigation costs. That is not a result this Committee should embrace.

There is no readily perceived reason to suggest that justice requires this legislation, if passed, be made retroactive. The Eckert revision and the Mead amendment are obvious attempts to rescue certain companies which are defendants in pending cases and which now, apparently, wish to reconsider tactical and strategic judgments they previously made in the course of the litigation. If they, and the other parties to the litigation, wanted contribution to protect their interests, they could have accomplished their purpose by private contractual obligation. Sharing agreements between co-defendants commonly provide the kind of protection this legislation would create. Sharing agreements, however, also can make accommodation for smaller defendants who do not have enough "stake" in the action to determine tactics for all defendants and who have a reduced "ability to pay" in comparison with larger defendants.

S.995 does not provide the kind of sophisticated sharing agreement typical of large actions involving significantly differently sized or situated defendants. It ignores the problems of smaller defendants in favor of the most simple, easy to apply formula. I believe that the settlement process must operate on an individual defendant basis. To regulate the division of damages in reality provides insurance for large defendants and threatens the survival of small defendants. By definition strict contribution removes "ability to pay" as a factor in antitrust litigation. Weak companies lose their personal characteristics and are thrown into a formalistic slot.

By the proposals to make S.995 retroactive certain defendants are attempting to impose one form of sharing agreement on defendants who chose not to have them. These large vulnerable-by-choice companies should not be allowed to transfer their fear to those they could not convince openly to join them in a private agreement of contribution. They elected to try cases in which they now face literally hundreds of millions of dollars of liability. They made their choices with their eyes wide open and with the advice of some of the most outstanding lawyers in the country. The proposals concerning retroactivity are an effort to hedge their bets after the dice have been rolled. Those who are advocating retroactivity have a particular, identifiable interest they seek to protect — as do I. They want protection "after the fact" to justify their previous decisions. I want to protect settlements which I made and on which my client relied and to insure that my client, a small company, is not forced back into massive litigation to protect a large company.

Mr. Chairman, if you or any member of your Committee have any questions, I would be more than happy to respond in writing or to appear before the Committee.

Michael H King

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BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

FEBRUARY 10, 1982

STATEMENT OF W. HOUSTON BLOUNT IN SUPPORT OF APPLICATION OF S.995 TO PENDING CASES

I am W. Houston Blount, President and Chief Executive Officer of Vulcan Materials Company. Our 6,000 employees are engaged in the manufacture of metals, including recycled aluminum and tin materials, chemicals such as chlorinated solvents and muriatic acid, and basic construction materials, including aggregate, slag, sand and the like. We have 122 production facilities in the states of Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, North Carolina, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

We support strict enforcement of the antitrust laws to protect the freedom we have to compete freely in open markets. We have always strongly emphasized our policy of strict antitrust compliance. The antitrust laws express an important policy of preserving the fair competition that is necessary to preserve our free enterprise system.

We are deeply concerned, however, that today these laws are being undermined by private lawyers to attack industry upon industry in order to obtain personal gain at the expense of competition. We have witnessed many companies around the country that have been forced to settle cases by paying staggering amounts unrelated to the companies' market share simply because these plaintiffs' lawyers have an awesome club at their disposal.

It is fundamentally unfair that a company with a 1% market share can be exposed to damage claims based upon the sales of an entire industry. The only way we have to protect ourselves if we were ever hit with one of these cases is a law that treats each company fairly by making it responsible for whatever harm it caused. That would permit each company to make the choice whether it wants to defend itself or to settle.

We strongly support this legislation. It seems to us, however, that it is extremely important that the Committee amend S.995 to at least apply the carve-out provisions to pending cases. If this legislation is needed to remedy an existing problem—which I believe is the case—then to not apply it to pending cases would permit the problem to continue in the very cases that gave rise to the legislation in the first place. That does not make sense. Moreover, if this bill does not apply right away, it may become an incentive for bringing new lawsuits, since plaintiffs' lawyers will seek to get the last windfall.

STATEMENT OF

ROBERT deR. CRAIGMYLE
Vice Chairman and President
GIANT PORTLAND & MASONRY CEMENT COMPANY
Columbia, South Carolina

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Robert Craigmyle. As Vice-Chairman and President of Giant Portland & Masonry Cement Company,[1/] I respectfully request that this Committee report favorably an amended S.995, so that the salutary effect of this legislation will not be denied to litigants in cases now before the courts and those who will be named in cases that are filed between now and the time this urgently needed law is enacted.

Failure to permit rights of claim reduction and contribution in private treble damage actions creates no incentive to comply with those laws, but creates instead the perception that the law is quixotic and unfair. As the Chief Executive Officer of a company that is dependent upon the construction industry, I can tell you that it threatens the viability of companies that find themselves faced with such litigation, and is therefore harmful to competition and to our country.

We are a small, widely-held company, with our only plant being in South Carolina. Our maximum shipping distance is about 300 miles, and we have never sold an ounce of cement in Arizona. Yet, we were named in a massive antitrust case against the cement industry, filed in Arizona in 1976.

[1/] I have been a member of the Board of Directors of Giant Portland since 1975, and the President and Chief Executive Officer of the company since November, 1979. Prior to that time, I practiced law with the firm of Milbank, Tweed, Hadley & McCloy in New York, served as senior attorney for Amax, Inc., and was Vice President, General Counsel and Secretary of Westrans Industries, Inc.

Despite the fact that the court several years ago recognized that non-Arizona defendants may not properly be within the jurisdiction of the court, such claims were not dismissed but were permitted to continue to be asserted pending full discovery on the merits.

In cases such as this, as more and more people can say from personal experience, such a ruling inevitably means many years of litigation. Perhaps we have been naive in believing that justice will prevail and our innocence proven. Our expenses just to process the papers in this suit have been significant to us. The losses our company has suffered over the last three years make the possibility of a coerced settlement being imposed upon us sufficient to jeopardize the viability of the company. The livelihood of our 300 employees and at least 500 others who rely directly upon us in the rural community of Harleyville, South Carolina, the investment of our stockholders, and the customers we serve are directly threatened by an unfair rule of law that would make us liable for what others did.

There has been no violation of the antitrust laws as claimed in Arizona. We are vigorously defending ourselves and expect to prevail. Our main concern, however, is the unfairness in not having any redress against plaintiffs in what we believe is an unfounded and capricious lawsuit. Making S.995 applicable to pending cases would give us the protection we need to avoid a forced settlement, and restore the balance necessary to antitrust remedies to ensure fairness to the hundreds of companies facing these claims in cases now before the court.

I urge the Committee to report an amended S.995 that permits claim reduction rights without delay. We support the proposed amendment language.

STATEMENT
OF
STEPHEN K. LAMBRIGHT, ESQUIRE
ANHEUSER-BUSCH COMPANIES

Mr. Chairman, Members of the Committee:

My name is Stephen K. Lambright. I am Vice-President for Industry and Government Affairs of Anheuser-Busch Companies.[1] For many years, Anheuser-Busch has made strict compliance with the antitrust laws one of our highest corporate priorities. At every level of our management, we have worked hard to guarantee a sensitive appreciation for and full compliance with the law, including all aspects of the antitrust laws. These laws embody basic policies which we strongly affirm. We believe that firm and fair antitrust enforcement will contribute to achieving the most efficient distribution of goods and services in a manner consistent with our other goals for a free society.

Nevertheless, a serious deficiency has developed in the area of private antitrust enforcement. Unlike other areas of federal law, such as the federal securities laws, there is no consistent and fair mechanism for apportionment of damages in private antitrust cases. In recent years, these cases have become a scandal.

A number of specific cases have been brought to the attention of this Committee in testimony during this Congress as well as the 96th. Innocent defendants are being forced to pay very large amounts in settlement of claims they dare not litigate for fear of the destructive level of potential recovery. More culpable parties are paying much less than defendants with only minor involvement. The lesson being taught is that this litigation is unpredictable and the results often irrational.

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[1] Our 18,000 employees work in St. Louis, Missouri; Newark New Jersey; Tampa and Jacksonville, Florida; Williamsburg, Virginia; Los Angeles and Fairfield, California; Houston, Texas; Columbus, Ohio; Baldwinsville, New York; and Merrimac, New Hampshire, as well as other parts of the country. We operate the Sesame Place family entertainment center outside Philadelphia, Pennsylvania, and the Busch Gardens theme parks in Williamsburg, Virginia, and Tampa, Florida.

Completely groundless cases, therefore, can pose a very real threat to every company, large or small, in every industry. The juxtaposition of the remedies of treble damages and attorneys' fees, joint and several liability, the "slight evidence rule," and the availability of certification procedures to bring an action on behalf of a national class pursuant to the provisions of Rule 23 (as revised in 1966), has transformed antitrust remedies into a kind of economic blackmail. Without congressional action to apportion damages, the mere appearance of a defendant's name on a summons and complaint may be sufficient to extract large sums in settlement. This is a sad commentary on the nature of our system of justice.

It is a mockery of our basic principles that a defendant with a small market share can be liable for damages based on an entire industry's sales.

We are vigorously litigating one case at present that is typical of the failure of the law in this area. This is a class action related to claims of a prior government civil case which was dismissed once and we expect to show is wholly without merit. Nonetheless, damage claims based upon total industry sales theoretically could be asserted against each defendant.

This rule, in itself, creates an opportunity for plaintiffs' lawyers to obtain recovery where there has been no injury. Thus, the present law encourages the tactic of threatening one defendant with industry-wide damages while, at the same time, attempting to persuade its competitor (particularly a competitor with a very large market share) to settle quickly and cheaply, without removing its sales. This can, as a practical matter, transform the treble damage action into a device for destructive anticompetitive behavior.

It is one thing to penalize an antitrust violator promptly and fairly. It is quite another to allow the present rule of law to continue--a rule which creates the strong tendency for larger, more culpable defendants to be penalized least, and smaller, less culpable or innocent defendants to pay much greater amounts in settlement or face serious potential liability at trial. This makes our constitutional guarantee of due process a hollow promise.

S.995, if properly amended to apply to pending cases, will operate to restore fairness and rationality to the litigation of claims within the scope of the legislation. Innocent defendants will be able to afford to defend themselves or settle for amounts reasonably related to their market share or culpability.

This will, in my view, greatly enhance the effectiveness of the private antitrust action as an instrument of our economic policy. We therefore support S.995 and the amendment that has been proposed to provide for rights of "carve-out" or claim reduction in pending cases.

STATEMENT OF THOMAS R. LONG

Mr. Chairman, Members of the Committee:

I am pleased to be here to discuss this important issue. My name is Thomas R. Long. I am Vice President and General Counsel of Westvaco Corporation.

Westvaco Corporation is a producer of paper, packaging and chemicals. Our 15,000 U.S. employees are located in 36 states. Our primary paper and paperboard mills in this country are located in Charleston, South Carolina; Covington, Virginia; Luke, Maryland; Tyrone, Pennsylvania; and Wickliffe, Kentucky. Timberlands, converting plants, chemical plants and other operations are located in many other States, including Delaware, Ohio, Alabama and Arizona.

While we support the Antitrust Equal Enforcement Act of 1981, S.995, we also strongly favor its applicability to pending cases. The legislation under consideration would make existing antitrust law more equitable by providing for contribution among conspirators in price-fixing schemes. It also provides a "carve-out" formula, by which trebled damages would be reduced in price-fixing cases by the amount attributable to the sales or purchases of any settling defendant.

On June 8, 1979, when I testified before the Senate Subcommittee on Antitrust, Monopoly and Business Rights in support of contribution and claim reduction legislation, the measure before the Committee on that day was an amendment proposed by Senator Birch Bayh which did not contain the type of provision that now appears in subparagraph 4(I)(e) of S.995. It therefore would have applied to cases pending at the time of enactment. I strongly supported enactment of that measure based upon my personal experience and that of Westvaco with the severe injustice of the current rules.

Under existing law, each member of a price-fixing conspiracy is liable for three times the damages caused by all of the conspirators combined. In the typical class action, potential damages run into the hundreds of millions, or even billions, of dollars. While sound antitrust policy demands ample deterrence against price-fixing, which is why violation of the law is a felony, it was never intended that the penalty should be confiscation of a defendant's business. Yet, this is the very risk which a nonsettling defendant faces today, and it is this risk which effectively takes away the trial option from innocent companies.

The amendment, which an attorney for the Business Roundtable was asked to draft as a compromise measure, would make the carve-out provisions of S.995 applicable to pending actions. It would not apply to or reopen any actions which had been finally adjudicated prior to the date of enactment, and is therefore not retroactive. The amendment protects existing settlements but contains a safety valve which makes claim reduction inapplicable in pending cases where the judge makes a determination that to do so would result in manifest injustice.

The recent Supreme Court decision in Texas Industries clearly places the burden on Congress to act. The trend in other areas of the law at both the federal and state level is to allow rights of contribution and claim reduction.

It appears grossly unfair not to apply the legislation in those cases where the abuses now exist and which caused Congress to focus attention on the problem in the first place.

Additionally, the normal rule is to apply legislation to cases pending on the date of enactment. The amendment poses no constitutional problem. S.995, if amended, would have no adverse impact on those who have settled. Former Solicitor General Robert Bork, Judge Griffin Bell, Judge Charles Renfrew and Senator Sam Ervin all agree.

This is reform legislation designed to ensure that antitrust laws are enforced on a fair and equal basis with justice for all. By providing that each defendant will be held accountable for the damages attributable to its own actions rather than the potential massive liability based on the actions of all, including those who have settled, the legislation will ensure that the coercive, "whipsaw settlement" tactics, whereby guilty defendants are "getting out cheap" and innocent defendants are unable to defend themselves, will be eliminated.

Some examples may be in order to show the pressing need for making the legislation applicable to pending cases.

Westvaco was forced to spend several million dollars in legal fees and approximately $1 million to settle the Corrugated Container litigation, although the District Court Judge stated in approving the settlement that the plaintiffs, after two months of trial, had not established a case against Westvaco.

The Mead Corporation is exposed to claimed damages of hundreds of millions of dollars in the civil case, more than 97% of which is attributable to 19 companies found by the jury to be co-conspirators who had settled prior to trial.

International Paper, one of the country's largest manufacturers of corrugated containers, with over eight percent of the defendants' market, was a felony indictee which pleaded nolo contendere and later was found to be a co-conspirator in the civil case as well. The company settled for only $8.3 million and now seeks to shift an exposure in the $100 million range to The Mead Corporation.

Green Bay Packaging, with only 1.7% of the defendants' market, was not indicted and was found not to be a co-conspirator, yet was forced to pay $5,557,000 in settlement because it could not afford to take the chance on a jury trial where, if found guilty, it would be liable for damages attributable to others, including felony indictees.

Continental Group, one of the larger defendants, was acquitted of criminal charges by a jury but, after 16 other defendants had settled, Continental settled for $27,400,000 or at a market share rate six and one-half times greater than International Paper.

The record shows plaintiffs engaging in a settlement strategy, unrelated to the merits, consisting of an "ice breaker" settlement to start the settlement stampede, divide and conquer tactics and escalating demands, all predicated on the increased exposure faced by a non-settler with each successive settlement. Even Judge Singleton, in the Corrugated Container litigation, acknowledged the inherent coerciveness of such strategy, which has become commonplace in antitrust class actions.

In the well publicized Plywood Antitrust Litigation, MDL 159 (E.D. La.), there are sizable sums attributable to settling defendants, which plaintiffs are attempting to collect from the defendants who went to trial.

In Cackling Acres Inc. v. Olson Farms, 541 F.2d 242 (10th Cir. 1976), the plaintiffs sued only one of the five conspirators but collected damages based on the business done by the five. Companies responsible for nearly 90% of the plaintiffs' damages escaped liability completely.

Franklin Container Corp. v. International Paper Co., No. 77-3204 (E.D. Pa.), is a pending purported class action against manufacturers of linerboard and corrugated containers. Five defendants, not including Westvaco, have settled and left their liability in the action. Without claim reduction, each non-settling defendant will be forced to bear the consequences not only for its own acts but also those of all other defendants.

In The Duplan Corp., et al. v. Deering Milliken, Inc., et al. (D. S.C.), decided June 12, 1981, Deering Milliken is presently exposed to damages amounting to approximately $12,500,000 attributable to the actions of a defendant which had settled.

These are the types of cases that demonstrate the need for congressional attention.

The inequities inherent in the existing law and which apply to hundreds, perhaps even thousands, of pending cases need to be addressed in S.995. To do so is consistent with the general rule of applying legislation to pending litigation except where to do so would be manifestly unjust.

Applying the legislation to pending cases assures equal treatment and discourages a race to the courthouse to file new lawsuits in order to obtain one last windfall for plaintiffs.

The law in the antitrust field has been uncertain for years. Careful lawyers have provided in their settlement agreements for a change in the law by the U.S. Supreme Court or by Congress. In the Corrugated Container litigation, the plaintiffs and settling defendants knew and took the risk of a change in the law because the issues of contribution and claim reduction were raised before most settlements were negotiated and before any were approved.

It is important to remember that settlements in pending litigation will not be upset by adoption of the proposed amendment.

Some who oppose the amendment have argued that distribution of the funds will be delayed if the amendment passes. Plaintiffs' counsel Stephen Susman, in a December 17, 1981 letter to House Judiciary Chairman Rodino stated:

> Furthermore, the amounts already obtained through settlement should easily support the amount of fees currently contemplated. In other words, the fees

> will most likely be the same whether we recover $325 million or $500 million. If anything, passage of this legislation and its being made applicable retroactively to Corrugated would benefit the attorneys, though not the class. It would facilitate settlement with Mead and allow the attorneys to wrap up the case and be paid sooner.

In summary, the amendment simply means that a defendant will be able to litigate its own liability and make decisions based on the merits of its own case rather than under the threat of being exposed to the liability of all defendants. If such a concept is fair for future actions, it surely must be fair for pending actions.

STATEMENT OF THE MEAD CORPORATION

Mr. Chairman and Members of the Committee:

I am James W. McSwiney. I am Chairman of the Board of The Mead Corporation. Mead is headquartered in Dayton, Ohio, and has a number of operations in both the United States and overseas. We employ approximately 24,000 persons and have almost 27,000 shareholders.

I appreciate very much the opportunity you are affording me and others to testify today in support of legislation that is very important to our entire society. The legislation that you introduced, Mr. Chairman, S.995, is essential to rectify the gross inequities that currently exist in antitrust litigation. Today, a company with a small market share can be exposed to damage claims based upon the sales of an entire industry. The gross inequity that precipitated Congress to act on this matter is most dramatically present in existing litigation, and equity for one and all is our plea. To provide such equity, S.995 should be amended to apply claim reduction to pending litigation, so that the hundreds of companies throughout the United States which are involved in current litigation will not be subjected to the intolerable injustice to which my company has been subjected.

Both large and small companies throughout the United States support the compromise language drafted by the counsel to the Business Roundtable at the request of members of this Committee which would apply claim reduction to pending cases, except where manifestly unjust. It is ironic indeed that the opposition to this proposed amendment is principally from only five companies, the largest of which is International Paper Company, the largest paper company in the United States -- a nolo plea contender and a defendant whose settlement has been approved by the Fifth Circuit Court. Burlington Industries, the largest textile manufacturer in the United States, has also joined with International Paper. In contrast, literally scores of smaller companies now understand the need for this legislation, and I am sure you will hear from them.

All my life I understood that our system of law is designed to assure fairness -- equal justice under the law; and I have believed, and still do, that if enough time is available truth, equity and justice will prevail. For many years, I mandated within our company compliance with the antitrust laws of our country. I repeatedly instructed our lawyers to conduct seminars so as to be sure that our employees understood the antitrust laws. Our people were instructed that, if they ever had a doubt about their conduct, they were to contact the General Counsel's office. On the other hand, I know one can never be sure that what one believes deeply and communicates earnestly is necessarily heard or followed by all. It sometimes is like telling your children to brush their teeth: they agree, report they have done so, yet still get cavities. So, some years ago I required outside counsel to conduct sessions with our sales people, one-on-one, on a privileged, confidential basis so as to assure that our employees understood the law. I know of no other company that took such a step to ensure compliance with the law.

Currently, the laws of our land are being so abused that justice is becoming a mockery in these large antitrust class actions.

I would like to relate to you how The Mead Corporation has been so unjustly victimized by current law.

Mr. Kohn, who is appearing before this Committee, was the lead plaintiffs' lawyer in what was termed the Fine Paper case -- antitrust litigation which was pending during 1980 in

Philadelphia and in which Mead was named a defendant. At the same time, Mead was a defendant in the Corrugated Container litigation in Houston. Both were national class actions with potential damages in the hundreds of millions of dollars, if not billions. Mead was innocent of the charges in both cases and was determined to prove its innocence. In each case, we had a relatively small share of the market. But, because current law permits damage exposure based not only upon your own sales but also those of the entire industry, we could not take the risk of going to trial at the same time in two massive national class action cases. On the eve of trial of the Fine Paper class action, Mead and several other companies were the last companies to seek settlement because several companies had previously settled without removing their sales. In the Fine Paper case, in addition to the class action, there were a number of cases brought by state governments making the same allegations. Because the exposure in the state cases was not massive, we and a number of other companies decided to go forward with the trial. The jury returned a verdict of not guilty, without the defense even having to put on a case. The lesson is clear. Plaintiffs' case was without merit, but the exposure in the class action to industrywide damages was so enormous that innocent companies had no choice but to capitulate to what, in essence, is a form of legalized blackmail. This is wrong for any society.

The Corrugated Container litigation, MDL 310, is the most egregious example of the abuses that are currently occurring in antitrust cases and for which this legislation was designed to remedy. In 1976, a federal grand jury commenced an investigation of this industry and returned indictments--felony and misdemeanor--against 14 companies and 26 individuals. Not one Mead employee was indicted; however, Mead was indicted as a corporation. To this day, we don't understand this. Unlike most of the defendants which pled nolo contendere, Mead pled not guilty and, after trial, was acquitted by the jury.

In the private civil cases which followed, the plaintiffs' lawyers engaged in economic terrorism. The largest company in the industry, with 8.3% of the market, settled early, paying $1 million per market-share point, for a total of $8.3 million; however, contrary to statements by plaintiffs' lawyers, they refused to settle with us or anyone else on the same basis. Instead, they demanded that the next company pay double -- or $2 million per market-share point. The company that capitulated to this demand was much smaller than the prior company and had not even been indicted in the criminal case. In addition, plaintiffs' lawyers refused to agree to the removal of sales by each settling company. The result was that financial exposure of nonsettlers increased geometrically. As a consequence, small companies, such as Green Bay Packaging who I understand is testifying here today, were held up by plaintiffs' lawyers and forced to pay an ever-increasing amount, totally unrelated to their market share or culpability. Further, fourteen companies paid $40 million to settle, even though they were later found not to be conspirators. This is hard to conceive, but it is the infamous record.

I have always believed that if you are innocent you should stand proud and tall, and not submit to blackmail. We proved our innocence in the criminal case and proceeded to trial in the civil case. To this day, no judgment has been entered in our case because plaintiffs failed to provide any evidence on which damages allegedly sustained by the class could be determined. The case should be closed, but the judge has appointed a special master to try and provide information which was clearly the responsibility of the plaintiffs although, if this process continues, it is likely that another six months or a year will ensue. All the while, the plaintiffs claim damages against Mead in the hundreds of millions of dollars, even though the company has only 2-1/2% of the market. They claim an amount greater than that paid by 97-1/2% of the market and almost 100 times greater than that paid by International Paper, the largest company in the industry, which pled nolo to criminal charges. Numerous errors were committed in our trial, which we are confident will eventually result in reversal of any judgment that may ultimately be entered on the jury verdict. Since the conclusion of the civil trial, in order to go about our normal business we have offered on many occasions to settle at a rate of ten times that paid by International Paper, but plaintiffs' lawyers have declined such settlement offers because they feel they hold a club over our head -- they have no real client to whom they report in these massive class action cases. Instead, plaintiffs' lawyers continue to try to force us to submit to blackmail by threatening us with a judgment based upon the sales of the settling defendants. This is wrong, and equity requires it be stopped.

The proposed legislation, as amended, would restore the right of a company to exercise its right to trial without being penalized for so doing. It will restore balance in that companies can rely on the relationship of their own market share and thereby not be subjected to blackmail and coercive settlements.

Mr. Chairman, we are asking for equity, not just for Mead but for all the citizens of this country. If one should conclude in his own mind that Mead should pay dearly as the plaintiffs would have you believe, then surely you would not want to condemn hundreds of others to this same fate without benefit of equitable treatment. I have always understood that the normal rule is that legislation applies to pending litigation, except where manifestly unjust, and that the courts are in the best position to determine this issue. Those who oppose have the burden to establish why the norm should not apply. The settling defendants have no basis for concern because the amendment as proposed protects them. Plaintiffs are also protected since, if to apply claim reduction results in manifest injustice, it will not apply.

It should also be noted that plaintiffs' lawyers in the Corrugated case have no claim to surprise. Throughout the period of the negotiation of settlements in the Corrugated case, as well as during the period of the district court's review and preliminary and final approval of those settlements, plaintiffs and other parties were well aware that claim reduction rights had been asserted by Mead and others. At no time did anyone suggest that if claim reduction were allowed the settlements would have to be upset. At no time has the district court ever said that the settlements are adequate only if Mead is liable for hundreds of millions of dollars. Indeed, at all times, plaintiffs urged approval of the settlements, knowing that there might some day be claim reduction in this case and Mead would be potentially liable for damages based only upon its own market share.

Significantly, many of the supporters of the compromise amendment are also class members in that litigation. As far as I know, no class member asked to testify before this Committee in opposition to the amendment because they thought they would be deprived of something to which they were otherwise rightfully entitled. Thus, while these plaintiffs' lawyers claim to be representing hundreds of thousands of class members, they cannot say that those class members asked them to appear here on their behalf.

At one time, the question was raised as to whether settlements might be in jeopardy in the Corrugated case if claim reduction were applied to that case. But, on October 29, 1981, the Fifth Circuit resolved that issue by affirming the adequacy of the settlements. At the same time, the court of appeals recognized that Mead had asserted the right of claim reduction in MDL 310, stating that "Mead's arguments are best left to another day and another forum."

The potential abuses that are occurring in the Corrugated litigation could occur in the over one hundred pending cases involving over 900 companies. There must have been a premonition of the need to apportion damages fairly in the introduction of this legislation. You can now provide the opportunity for equity and let the courts of this land, as they always have, decide each person's fate. And, if the underlying legislation is needed, which I believe has been so clearly demonstrated, then surely it is needed in the very cases that precipitated the concerns in the first place. Justice delayed is justice denied.

Thank you.

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DIRECT DIAL NUMBER
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February 17, 1982

The Honorable Strom Thurmond
United States Senate
209 Russell Office Building
Washington, D.C. 20510

Re: S.995

Dear Senator Thurmond:

On behalf of the 60 companies, large and small, which support applying claim reduction to pending litigation, we appreciate very much the hearing you held on Wednesday, February 10, 1982, to permit the various interests on this issue to be heard. The hearing procedure was fair and we are gratified that the proponents of an amendment had an opportunity to share with you and the Committee our collective views.

As you know, a few plaintiffs' antitrust lawyers oppose not only application of claim reduction to pending cases but also S.995, as introduced. This is not surprising. As Senator Ervin testified:

> I have noticed for a long time in the study of history and in observing things that nobody who has the power to practice tyranny on another ever voluntarily wants that power taken away. That is exactly the situation of the plaintiffs in these cases who oppose this bill and applying it to pending actions. (Tr. at 79.)

Plaintiffs' lawyers again made a number of erroneous statements in their testimony, which should be corrected. Without unduly burdening the Committee, we address some of them.

1. Senator Tydings stated that Georgia-Pacific, Mead, Milliken, Weyerhaeuser and Willamette "came before the Committee with unclean hands." (Tr. at 101-02.) In the Plywood litigation, however, there was no criminal case. Indeed, the only government action that existed was brought by the Federal Trade Commission, and the litigating defendants were completely exonerated by the Court of Appeals for the Ninth Circuit, which held that there had been no violation of the Federal Trade Commission Act. In the Corrugated Container case, Mead was acquitted in the companion criminal case; whereas, companies such as International Paper and Boise Cascade, which are seeking special protection from this Committee by having paragraph (e) kept in S.995, both pled nolo contendere to criminal charges. In the Milliken v. Burlington Industries case, there was no companion criminal case.

2. Mr. Susman's rhetoric defied fact:

(a) He testified that 200,000 American businesses sustained $2.5 billion in damages in the Corrugated Container case. No jury, however, has ever determined the amount of damages, if any, sustained in the Corrugated Container litigation. As of this date, there is still no judgment entered in the Corrugated Container litigation against The Mead Corporation. Mr. Susman specifically told the jury, in his closing argument, that it was "immaterial" as to what the amount of damages might be or whether Mead would even be liable for damages based upon the sales of others. He said to the jury:

> Ladies and Gentlemen, if the judge felt the amount of money was material to your deliberations, instead of asking

> for a percentage in question 7, what you're going to get tomorrow, he would have a dollar sign. But he doesn't anywhere in that instruction ask you to compute a dollar amount, because in a case like this, no one knows who's going to file claims.
>
> No one knows what the judge is going to eventually determine whether the law requires Mead to be responsible for someone else's sales. It's simply immaterial. (Tr., Vol. 99, at 346-48.)

(b) Mr. Susman states that "the Eighth Circuit decision did not involve claims reduction, only contribution, and no bill was pending in Congress at the time we accepted $298 billion in settlement." (Page 111.) In the Professional Beauty decision, however, there is a specific reference to claim reduction in the event of a settling defendant. Moreover, on May 15, 1979, prior to approval of the settlements, Senator Bayh offered an amendment in mark-up of S.390 permitting contribution and claim reduction which was silent as to applicability date. Thus, at the time of preliminary approval of the settlements, the only appellate decision on the issue permitted contribution and claim reduction in antitrust cases, and there was pending legislation that would have been applicable to pending litigation under the normal rule of statutory construction. Nevertheless, plaintiffs sought approval of the settlements even though claim reduction might occur in the case.

(c) Mr. Susman told the Committee:

> We the plaintiffs in the Corrugated case are going to make them [defendants] litigate because there is too much doubt as to the constitutionality of applying S.995 retroactively for us to fulfill our fiduciary duties to the class by settling at a small amount. (Tr. at 113.)

Yet, Mr. Susman recently took the opposite position in the House of Representatives, writing to Chairman Rodino on December 17, 1981:

> If anything, passage of this legislation and its being made applicable retroactively to Corrugated would benefit the attorneys though not the class. It would facilitate settlement with Mead and allow the attorneys to wrap up the case and be paid sooner.

(d) Mr. Susman disputed Judge Bell's point to the effect that attorneys' fees usually exceed any recovery by members of the class in antitrust class actions. Mr. Susman commented:

> In the Corrugated case the attorneys' fees--we are fixing to apply for fees shortly--will be less than one-third of the interest earned on the settlement funds. (Tr. at 114.)

What Mr. Susman failed to mention is that the interest on the settlement funds now amounts to more than $150 million. Thus, plaintiffs' lawyers may seek up to $50 million in fees under this analysis. Indeed, Mr. Susman in one article was quoted as saying he would seek $15 million himself. In contrast, his own clients that are not merely class members but are also named representative members of the plaintiffs' class will receive the following amounts from the existing settlement fund:

Adams Extract Company	$ 1,360.00
After Six, Inc.	680.00
Doranne of California, Inc.	38,122.50
Grist Mill Co.	5,950.00

Mr. King, on behalf of International Paper Company, testified that he opposed applying claim reduction to pending cases because of his concern with the possible upsetting of settlements in the Corrugated Container litigation. Specifically, he said:

> In light of the history of settlement negotiations, settlement approvals, class action notice, appeals and affirmances, all on the basis that there was to be no claim reduction and no carve-out, for the Congress to come in and say to all of the parties and to the courts "undo all of that; forget everything that has happened and all that history, and start all over again," we think raises very troubling questions. (Tr. at 143.)

Mr. King continued by stating that the settlement issue will be litigated:

> on the grounds that the very basis upon which they were entered--to wit, no claim reduction--has been frustrated by the action of the Congress in adopting retroactive law. (Id. at 144.)

Mr. King, however, totally ignored the fundamental facts in connection with the settlement negotiations and approval of the settlements. Those are outlined in detail by Judge Renfrew in his written statement submitted to the Committee. At the time the settlements were negotiated and approved, the law on claim reduction was unsettled, with the only appellate decision being the Professional Beauty decision of February 27, 1979, which favored it. Senator Bayh, on May 15, 1979, had already introduced his proposed amendment in mark-up of S.390 permitting contribution and claim reduction, which was silent on applicability date. Mr. Susman, on May 16, 1979, urged the district court to preliminarily approve the settlements, even though he knew that claim reduction might apply in the Corrugated case. Indeed, Judge Singleton stated that the claim reduction issue would be resolved at a later time, stating:

> It seems to me that claim reduction would be an argument that you could make at the conclusion of the case when you're talking about a motion before the Court to reduce the damages . . . ." (Tr. at 52-56.)

Significantly, at last Wednesday's hearing before this Committee, Mr. Susman admitted:

> It is pointed out that the plaintiffs knew of the possibility that Congress might adopt a rule of claim reduction and yet urged approval of the settlements notwithstanding. Of course. (Tr. at 110.)

While opponents of an amendment to S.995 made a number of other misstatements, I will not further burden this Committee with a response to every instance. What is most important is that there are literally hundreds of companies--over 900--both small and large--which are involved in pending litigation. It would be fundamentally unfair to delay this needed remedy because of the unfounded objections of a few.

We request that this letter be made a part of the record.

Very truly yours,

Alan Wiseman

Alan Wiseman

cc: The Honorable Charles McC. Mathias, Jr.
The Honorable Paul Laxalt
The Honorable Orrin G. Hatch
The Honorable Robert Dole
The Honorable Alan K. Simpson
The Honorable John East
The Honorable Charles E. Grassley
The Honorable Jeremiah Denton
The Honorable Arlen Specter
The Honorable Joseph R. Biden, Jr.
The Honorable Edward M. Kennedy
The Honorable Robert C. Byrd
The Honorable Howard C. Metzenbaum
The Honorable Dennis DeConcini
The Honorable Patrick J. Leahy
The Honorable Max Baucus
The Honorable Howell Heflin

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T. Marshall Hahn, Jr.
President

February 17, 1982

The Honorable Strom Thurmond
Chairman
Committee On The Judiciary
Dirksen Senate Office Building
Room 2226
Washington, D. C. 20510

HAND DELIVERED

Dear Senator Thurmond:

This letter addresses certain misstatements made in the course of presentations made by Harold E. Kohn and Joseph D. Tydings at Committee hearings on February 10, 1982. It is respectfully requested that this letter be included as part of the record of those hearings.

The misstatements referred to above concern Georgia-Pacific Corporation and its support for the amendment to S. 995. Implications were made at the hearings on February 10 that support for amending S. 995 is limited to a small number of companies, like Georgia-Pacific, who were described as consistent price fixers and violators of antitrust laws. First, Messrs. Kohn and Tydings know very well that business support for this legislation is broadly based. Second, Georgia-Pacific is neither a consistent price fixer nor a violator of the antitrust laws. In fact, Georgia-Pacific's antitrust record is remarkably clean.

Between 1960 and 1980 more than 22,500 private and government (civil and criminal) antitrust cases were commenced in federal district courts.* In the same period, more than 470 criminal antitrust cases were instituted by the Department of Justice.** In the last twenty years, Georgia-Pacific has been named in only one of these criminal cases, United States v. U.S. Gypsum et al, 383 F. Supp. 462 (W.D. Pa. 1974).* In this case, Georgia-Pacific and three other non-settling defendants were found guilty after trial on July 15, 1975. On January 6, 1977, the convictions of these defendants were reversed by the Third Circuit Court of Appeals, 550 F.2d 115 (3d Cir. 1977). The Third Circuit opinion reversing these convictions was affirmed by the Supreme Court on June 28, 1978 (438 U.S. 422). The cases against these four defendants were dismissed on March 3, 1980 in an unpublished decision. Senator Tydings is therefore in serious error when he represents to this Committee, as he did on February 10, 1982, that Georgia-Pacific has "been adjudicated guilty of price fixing and price violations not once but many times in the past."

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* Clabault, J. & Block, M., Sherman Act Indictments 1955-1980, Vol. II, Federal Legal Publication, p. 677 (1981).

** Id. at 687.

In two other product areas -- folding cartons and corrugated containers -- where Georgia-Pacific has been an active competitor and where the Department of Justice has taken criminal action, such criminal action has never challenged the legality of Georgia-Pacific's conduct. Indeed, although there have been numerous price fixing inquiries and investigations in industries where Georgia-Pacific actively competes, the company is notable by its absence from the filed cases.

Relatively few civil cases have been brought against Georgia-Pacific in the last twenty years. These cases have either been settled with no admission of guilt or have been dismissed. One case, In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), is on appeal to the Supreme Court. This case, more than any other, makes the proposed amendment to S. 995 vitally important. As such, it is fundamental that the facts of this case be objectively examined and clearly understood, without the attendant rhetoric which has accompanied some of the past statements made by opponents of the posed legislation in characterizing its supporters.

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* Twenty-five years ago, in 1957, Georgia-Pacific entered a nolo plea which resulted in a $5,000 penalty. Seventeen other defendants also pled nolo. The amount of commerce involved totaled less than $15 million. That instance represents the only time in the past 27 years (since 1955 where records are available) that Georgia-Pacific has pled nolo. Accordingly, Judge Bell's statement that Georgia-Pacific has never pled nolo should be amended to reflect this case.

Turning to the Plywood matter, there are two contradictory opinions on the same set of facts by the Fifth Circuit (supra) and the Ninth Circuit (Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980)). The Ninth Circuit found "a complete absence of evidence implying overt conspiracy" (Id. at 582). It also found "a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect" (Id. at 579). Judge Wallace observed that Georgia-Pacific's method of quoting plywood prices was "a natural and competitive development in the emergence of the southern plywood industry", since the "use of West Coast freight made possible ready comparison between western and southern plywood prices" and "encouraged expansion of southern mills" (Id. at 578, 582). The Ninth Circuit found a "complete lack of buyer testimony objecting to the practice", with purchasers instead expressing the "belief that the system had no effect on prices" (Id. at 580). In sum, Judge Wallace concluded that "there was no evidence to support a finding of overt collusion" in adopting the pricing system under attack (Id. at 577). The Court further found that Georgia-Pacific's pricing policy had no adverse effect on the ultimate price paid by its customers.

On September 8, 1981, after the Ninth Circuit rendered a decision in favor of Georgia-Pacific, the Fifth Circuit (655 F.2d 627) affirmed a jury verdict directly contrary to the opinion of Judge Wallace. In ruling that there was sufficient evidence to find a conspiracy, the Fifth Circuit made no effort to reconcile the discrepancy on the merits. Instead, Judge Ingraham dismissed the Ninth Circuit result in a footnote on the ground that the Fifth Circuit was not "bound" by the earlier decision (Id. at 636-37 n. 2).

In light of the diametrically opposed decisions of the Fifth and Ninth Circuits regarding the legality and effect of the same pricing practices of the same parties over the same time spans, this matter is being appealed to the Supreme Court. Any implication that Georgia-Pacific has violated the law with regard to its pricing of plywood is therefore in error. Until the Supreme Court acts, any statement or implication of Georgia-Pacific's guilt is premature and unfair.

Finally, I would like to take this opportunity to both commend and thank you for the time and attention you personally have given to this most serious matter, and for affording us the opportunity to present fully arguments in support of the proposed amendment to S. 995 to your committee.

With best wishes, I am

Sincerely,

T. Marshall Hahn, Jr.

APPENDIX C

RESOLUTIONS OF THE SECTION ON LEGISLATION TO PERMIT CONTRIBUTION

Approved by the Council of the
Section of Antitrust Law
August 17, 1979

Be It Resolved that the Section of Antitrust Law supports an amendment of the Clayton Act (15 U.S.C. § 12, *et seq.*) which would permit contribution among joint tortfeasors in damage actions brought thereunder, provide that the basis for such contribution claims be the relative responsibility of each tortfeasor for the damages recoverable by plaintiff, provide that contribution shall not be available by or against one who has settled pursuant to an agreement with the plaintiff, provide that any damage award recoverable by a plaintiff shall be reduced by the amount for which the settling defendants would have been responsible for contribution, and establish time periods within which contribution claims can be asserted.

Be It Resolved, Further, that the Chairman of the Section of Antitrust Law or his designees be authorized to appear before the appropriate committees of Congress, and elsewhere, to communicate the Section's views with respect to the subject of contribution among joint tortfeasors in antitrust actions.

REPORT OF THE SECTION ON PROPOSED AMENDMENT OF THE CLAYTON ACT TO PERMIT CONTRIBUTION IN DAMAGE ACTIONS[*]

I. INTRODUCTION

At the 1979 Spring Meeting of the Antitrust Section, a task force was appointed from the members of the Civil Practice and Procedure Committee to consider whether a right of contribution should exist among antitrust defendants and whether the matter should be addressed by legislation. To assure broad consideration of the relevant concerns and trade-offs, members of the task force were asked to answer a questionnaire directed both to legal issues and practical considerations that would arise under a rule favoring contribution. A copy of the task force questionnaire is attached to this report.[†]

On August 14, 1979, the task force submitted its report to the Council of the Antitrust Section (the Section). A majority of the task force concluded that legislation recognizing a right of contribution should be adopted. A minority of the task force argued to the contrary. In this report with legislative recommendation, the Section adopts the view of the majority favoring contribution. The task force minority report appears on page 306.

In May 1979, shortly after the appointment of the task force, an amendment to S. 390 was offered by United States Senator Birch Bayh. The amendment would have provided for contribution only in price fixing cases. The officers of the Section Council decided not to take a position on the Bayh Amendment to S. 390,[1] but requested instead that the task force consider the matter. An alternative legislative proposal which would provide for contribution in all antitrust cases where appropriate is presented in Part III of this report.

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[*] *This report, with a legislative recommendation, was approved (as modified) by the Council of the Section of Antitrust Law in a regular meeting on August 17, 1979, held at Keystone, Colorado. The report and recommendation reflect only the views of the Section, and do not purport to be those of the American Bar Association or its House of Delegates.*

[†] This bill has been reprinted at page 316 *infra*.

[1] S. 390, the Antitrust Procedural Improvements Act of 1979, dealt with a variety of procedural aspects of antitrust cases. Before the Bayh amendment was offered, the Section endorsed parts of S. 390 and opposed other parts.

Senator Bayh withdrew his amendment and it thus did not become part of S. 390. On July 9, 1979, however, Senator Bayh introduced S. 1468, a separate bill, again seeking to establish contribution in price fixing cases alone. A copy of S. 1468 is attached to this report.[††] The Section strongly endorses the general objectives of S. 1468. For reasons more fully described in Part IV of this report, however, we would substantially modify S. 1468 to achieve further objectives. First, we do not believe that contribution should be limited to price fixing cases. Judicial relief in numerous other types of antitrust cases may be equally appropriate and contribution should be available in those other cases as well. Second, we believe that the basis set out in S. 1468 for measuring contribution, "the damages attributable to [defendants'] sales or purchases," while generally appropriate for horizontal price fixing cases, may not be the most appropriate basis for contribution in the broader array of cases which we believe should be covered. Finally, we would provide a cut-off date after which contribution claims would be barred. S. 1468 is silent in this respect, and appears to permit such claims long after judgment. We think that would be unnecessarily costly of judicial and private resources.

The suggested broadening of S. 1468 might have been attempted by means of proposed amendments to S. 1468. However, because that bill is already out of committee, and because the Section suggests an extensive increase in the scope of S. 1468, we have chosen instead to propose a draft of a bill which we believe illustrates how the goals of our proposal could be met. Of course, it is the objectives of our proposal that are important, and the precise words and phrases of the bill might warrant adaptation in light of subsequent comments and developments. Moreover, our legislative proposal can readily be recast as an amendment to S. 1468 should that become desirable.

II. GENERAL DISCUSSION OF CONTRIBUTION

The Section favors contribution on the basis of fundamental fairness. The absence of such a rule subjects each defendant in every antitrust case predicated upon joint conduct to the possibility of being required to pay the entirety of a judgment, without recourse, while others escape without any penalty whatever. Justice requires some distribution of the impact of a judgment. As the Supreme Court recently explained:

[**] The questionnaire is reprinted at page 303 *infra*.

> [A] more equal distribution of justice can best be achieved by ameliorating the common law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974).

While there exists in any proceeding a manifest unfairness in exposing parties to substantial liability whimsically imposed, the result of such exposure in large national class action litigation has been overwhelming. Small and regional defendants, maintaining total innocence of wrongdoing and a desire for a trial on the merits, have been confronted with the risk of massive liability based on the national sales of larger defendants. Many such defendants have, as a practical matter, been forced to settle without regard to liability or damage caused. Far from being a hypothetical scenario, as suggested by the task force minority report, the testimony presented in connection with the Bayh Amendment to S. 390 demonstrated that this is a very real problem faced by many companies.

The clear trend of the law has been toward the broader availability of contribution. The rule that no contribution is allowed among joint tortfeasors, an outgrowth of the early English case of *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), has now been rejected in its jurisdiction of origin, *see* The Law Reform (Married Women and Tort-feasors) Act, 25 and 26 Geo. 5 c.30 (1935), and in a large majority of American jurisdictions. *See generally Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 718 (2d Cir. 1978) (Friendly, J.). In cases other than antitrust cases, the federal courts increasingly have rejected a "no-contribution" rule. *See, e.g., Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *Knell v. Feltman*, 174 F.2d 662 (D.C.Cir. 1949); *Gould v. American-Hawaiian Steamship Co.* 387 F. Supp. 163 (D.Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). As the *Gomes* court concluded:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. 394 F.2d at 467.

Similarly, Congress has expressly permitted contribution when it considered the issue as, for example, under the securities laws. *See* Securities Act of 1933, § 11(f), 15 U.S.C § 77k(f); Securities Exchange Act of 1934, §§ 9(e) and 18(b), 15 U.S.C. §§ 78i(e) and 78r(b).

In antitrust cases as well, the federal courts have begun to recognize the need for contribution. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), the only federal appellate decision on the issue, the United States Court of Appeals for the Eighth Circuit recently nudged antitrust law toward conformity with the trend of the law generally. Plaintiff, a wholesaler of cosmetic supplies, sued National Beauty Supply, Inc., another wholesaler, alleging that National had induced the manufacturer to grant National an exclusive dealership and terminate plaintiff. National filed a third party complaint for contribution against the manufacturer, over whom National alleged it had no control. On appeal following a dismissal for failure to state a claim, the Eighth Circuit held that fairness dictated that a suit for contribution be permitted. After the *Professional Beauty Supply* case was decided, certain district court cases have continued to hold that contribution is not available. *E.g., In re Corrugated Container Antitrust Litigation*, 84 F. Supp. 842,48 (S.D. Tex. 1979). Significantly, however, the Seventh Circuit in *Heizer Corp. v. Ross, supra*, recently endorsed the decision of the Eighth Circuit in *Professional Beauty Supply*. While the law is currently unsettled, the trend is apparent.

Those who oppose contribution do so primarily on the grounds that they believe that (1) contribution will complicate antitrust litigation, (2) courts should not waste time settling differences among defendants who have committed intentional torts, and (3) contribution will deter settlements by rendering less certain the calculation of liability and damages attributable to a settling defendant.

With respect to the argument that contribution will complicate litigation, the Section believes that the obvious unfairness which attends a rule of no contribution cannot be justified simply because it may reduce court costs and make litigation simpler. We think that trial courts have ample power under the Federal Rules of Civil Procedure to prevent added complexity from working hardships or injustice. The court can sever the contribution phase of the case, FED. R. CIV. P. 42(b), or even require a separate action by refusing to permit third party claims, FED. R. CIV. P. 14(a), *Connell v. Bernstein-Macauley, Inc.*, 67 F.R.D. 111 (S.D.N.Y. 1975) (third party contribution claim denied).

The Section rejects the argument that any injustice will result from the addition of parties not named as defendants by the plaintiff. Under our proposal, contribution claims are permitted only against those whose conduct the plaintiff alleges was wrongful and for which conduct the plaintiff claims damages. There is nothing unfair in adding such parties to a proceeding. As a practical matter, the plaintiff generally sues most or all of those he claims have injured him, so that the addition of parties is not likely to be a major problem.

The argument that intentional tortfeasors should not qualify for the court's protection has been rejected by the Section, like others before it, for a number of reasons. First, a refusal to permit a contribution action by one intentional tortfeasor creates an unjust windfall for another intentional tortfeasor—the joint tortfeasor who, by denial of the right of contribution, thereby avoids paying his share. There is an obvious lack of justice in such randomly visited impact. Second, many antitrust suits do not involve "intentional" behavior in the usual sense of that word. Even in price fixing cases, the type most often cited as intentional, the Supreme Court has made clear that intent is not a prerequisite to a civil award. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978). The case law is replete with examples of good faith efforts to comply with the antitrust laws that were later held unlawful.[2] Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. Whatever the wisdom of making an employer strictly liable for civil injuries in such circumstances, under no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

With respect to the argument that contribution may deter settlement, there are several answers. First, there is good evidence that the existence of contribution will not deter settlement but will promote it. Judicial experience in the application of comparative negligence principles, analogous to those of the contribution rule such as we propose, is that increased uncertainty has not deterred settlement.[3] Similarly, in many antitrust cases, parties have entered into judgment sharing agreements apportioning liability according to an agreed upon formula. The experience of parties where such agreements have been in effect has been that settlement discussions occur on a more rational basis, with liability logically related to culpability and impact upon the plaintiff, and settlement is thus promoted. The proposed legislation ensures that a settling defendant is free of contribution claims by those remaining in the case, and thus does nothing to diminish the motive for settlement.

Where a settlement must be approved by the court, as in the class action context, there is an additional matter to consider—the need for the court to assess the impact of the settlement upon the total class recovery. The task force minority report argues that because a judgment could be reduced by the contribution share of a settling defendant, the district court will be unable accurately to assess before trial the impact of a partial settlement upon the total potential recovery, with the result that the court will be unable to approve the settlement. We rejected that view for two reasons. To begin with, the inquiry into relative ultimate liability is not appreciably different from the determinations now made under Rule 23. In assessing the fairness to the class of any proposed settlement, the strength of the claims against the defendant to be released and the strength of the claims against the remaining defendants is routinely, and appropriately, evaluated by the court. More important, however, is that the proposed statute gives the plaintiff the option of simply dropping its claims insofar as they are predicated on the acts of the settling defendant. This flexibility concerning the effect of a settlement on the remaining claims enables the plaintiff and the court with greater certainty to determine the impact of partial settlement.

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[2] *E.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Topco Assoc., Inc., 405 U.S. 596 (1972); Simpson v. Union Oil Company, 377 U.S. 13 (1964).

[3] United States v. Reliable Transfer Co., 421 U.S. 397, 408 n.13 (1975) ("[C]omparative negligence . . . does not appear to discourage the negotiation of settlements. . . .").

In summary, we believe that the only settlements which will be deterred by the proposed legislation are unfair settlements based on the risk of massive liability, without regard to culpability or damage caused. Even if the situation were otherwise, however, the Section would not support an unjust substantive rule simply because it facilitates quick settlement. The Supreme Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975), similarly rejected that notion:

> [A]t bottom, [this argument] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

As discussed above, one federal appellate court in *Professional Beauty Supply* has already held that contribution is available in antitrust litigation. The court in *Professional Beauty Supply* adopted a per capita rule as the basis for contribution.[4] While a per capita basis for contribution might be better than no contribution at all, such a formula would not be suitable for all cases. Our proposal incorporates a more flexible basis for contribution. *Professional Beauty Supply* also left open numerous questions corollary to a broad rule allowing contribution, including the effect of contribution on prior settlements and the procedures and time limits for asserting rights of contribution. The very existence of such open questions has given rise to a variety of disputes which are now working their way slowly through the courts.[5] Definitive rules of law may take years to evolve. Thus, comprehensive legislation, such as that proposed by the Section, can cut short those years of litigation and attendant uncertainty as to many of such rules. Accordingly, we believe that comprehensive legislation of the type we propose, not the decisional process, is the most appropriate means for fashioning a contribution rule.

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[4] The Eighth Circuit used the term "pro rata" in describing the basis for contribution to be applied in the *Professional Beauty Supply* case. It is apparent, however, from a complete reading of the case, that the court intended contribution to be divided equally on a "per capita" basis. Accordingly, we have used the latter term throughout this report to avoid confusion.

III. A STATUTORY PROPOSAL FOR CONTRIBUTION

In this part of our report, the Section offers a statutory proposal which we believe illustrates how the right to contribution might be appropriately established, while at the same time effectively addressing the numerous procedural questions raised. In Part IV we discuss the objectives of our proposal which, as already noted, we consider to be more important than its precise wording.

The proposed amendment to the Clayton Act would provide as follows:

> Section ______. *Contribution Rights of Defendants.*
>
> (a) In any action brought under section 4, 4A or 4C of the Act, if the damages recoverable from any defendant were, in whole or in part, caused by the wrongful acts or omissions of another, rights of contribution shall exist and be enforceable in accordance with this section, and not otherwise.
>
> (b) Claims for contribution in antitrust actions may be asserted by the filing of a counterclaim, cross-claim or third party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.
>
> (c) Claims for contribution will be barred unless they are filed (i) within one year of the date of service of the original complaint giving rise to potential liability, or (ii) within sixty (60) days after the claimant for contribution receives reasonable notice of his liability or potential liability based in whole or in part upon damages caused by the wrongful acts or omissions of another, whichever date occurs later. Notwithstanding the foregoing, claims for contribution shall be barred unless they are filed within sixty (60) days after the entry of final judgment by the district court awarding damages against a prospective claimant for contribution.

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[5] *See, e.g., In re* Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); *In re* Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979); Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979); In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979).

(d) Contribution rights may be claimed only against those persons for whose wrongful acts or omissions plaintiff seeks to recover damages from one or more defendants.

(e) Contribution may not be obtained in favor of or against a person who, pursuant to a settlement agreement with a plaintiff in the action in respect of which contribution rights are claimed, has been released from potential liability for the underlying claim. To avail itself of this paragraph, a settling defendant must advise the court and all other defendants, in writing, of the existence of the settlement agreement within sixty (60) days of its execution.

(f) Following a settlement in the action in respect of which contribution rights are claimed with less than all defendants, the plaintiff may, within sixty (60) days of the settlement, elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person or persons. Failing such an election by plaintiff, the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement.

(g) Contribution claims shall be determined by the court following the trial of the action in respect of which contribution rights are claimed in accordance with the relative responsibility of each party for the damages awarded in the main action which are subject to contribution rights as provided herein.

(h) Nothing in this section shall preclude two or more persons from agreeing to (i) apportion their collective liability in some manner other than as specified in this section or (ii) toll the automatic barring effect of paragraph (c).

(i) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

IV. DISCUSSION OF STATUTE

Paragraph (a) of the proposed statute establishes the basic right to contribution of defendants in all antitrust damage actions where one party is sought to be held liable for the wrongful conduct of another. As already noted, a shortcoming of S. 1468 is that it is limited to horizontal price fixing cases. Apart from the fact that some price fixing cases lend themselves to a simple, formulistic establishment of the measure of contribution, *i.e.*, market shares, the limitation is not supportable. Certainly many other kinds of violations can demonstrate an equal or even greater need for contribution. For example, a legislative limitation of contribution to price fixing cases would preclude statutory contribution on the compelling facts confronted by the Eighth Circuit in *Professional Beauty Supply*. That case involved allegations of a vertical boycott where the defendant seeking contribution claimed that the restraint, if any, was imposed by the supplier from whom defendant sought contribution.

Paragraphs (b) and (c) of the proposed statute must be read together. Paragraph (b) establishes that claims for contribution may be brought in a separate action or may be filed by way of counterclaim, cross-claim or third party claim in the plaintiffs' main action. Paragraph (c) establishes the dates after which contribution claims will be barred. The Section believes it is preferable to have all claims for contribution litigated in the main action, and we have sought in our proposal to encourage that wherever practicable. We recognize, however, that considerations of personal jurisdiction, venue, and the discretionary quality of third party practice may create some cases where such a procedure becomes unworkable. Moreover, severance may be appropriate in certain cases. To deal with such cases, our proposal permits a separate action. Normally, however, because of the time periods established in paragraph (c), contribution will be claimed contemporaneously with the main action, either as part of it or subject to being consolidated with it by the Judicial Panel for Multidistrict Litigation under 28 U.S.C. § 1407.

Paragraph (c) provides that claims for contribution will be barred unless filed within one year of the service date of the original complaint, or within sixty days after the claimant for contribution has reasonable notice* of its claim, whichever date occurs later. The Section believes that it is desirable to require claims for contribution to be filed as soon as possible after they are apparent. However, a defendant in a newly filed proceeding is entitled to some substantial period of time to evaluate its case, confer with others and perhaps explore a sharing agreement before being required to state contribution claims. The Section's proposal provides that a contribution claim must be filed within one year from the filing of the original complaint. Once that year has passed, however, a claimant would have only sixty days after notice to name a contribution defendant. Permitting a defendant routinely to file a contribution claim at any time during the pendency of the plaintiff's action or thereafter could prejudice any new party from whom contribution is sought, particularly after the basis for liability and the formula for damages have become established. To provide a limitation for the rare case in which there is an early judgment or in which a contribution claim does not become apparent until trial or after, the proposed statute provides that all contribution claims are barred sixty days after judgment in the trial court, irrespective of the one year provision and the existence of notice.

Paragraph (d) provides that contribution rights may be claimed only against those persons for whose wrongful acts or omissions the plaintiff seeks to recover damages. One criticism often advanced against a rule favoring contribution is that defendants might be able to obfuscate or complicate a plaintiff's case by adding parties improperly and indiscriminately. Under the Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 14(a), the court *always* has discretionary power to prevent that result. Paragraph (d) further limits the possibility by providing that a contribution claimant may name as contribution defendants only those persons relied upon in the plaintiff's own theory of its case. Thus, in a horizontal price fixing case, where the plaintiff offers a damage schedule based upon purchases from a nondefendant co-conspirator, contribution could be claimed from that nondefendant. Similarly, where plaintiff claims injury from an unlawful vertical arrangement between a defendant and a nondefendant, contribution against the nondefendant could be sought by the defendant. Without such specific reliance by plaintiff, however, a contribution claim would not be permitted.

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*By "reasonable notice," our proposal contemplates, for example, the filing of some document or statement in open court by the plaintiff that in fact apprises the contribution claimant of the existence of his claim and the identity of the potential contribution defendant.

Paragraph (e) will prohibit contribution by or against a settling defendant. To make certain that contribution rights do not discourage settlements, it is essential to permit a party to settle a case once and for all. A powerful policy in the law favors even the partial settlement of antitrust litigation, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346-47 (1971), and a defendant is less likely to settle with the plaintiff if he knows that, settlement notwithstanding, he may remain liable for contribution to the other defendants. Experience in other areas has demonstrated the soundness of this rule. *Compare* Uniform Contribution Among Joint Tortfeasors Act § 4(b) (1955), 12 UNIFORM LAWS ANNOT. 98, (1975), *with* Uniform Act § 5 (1939), 12 UNIFORM LAWS ANNOT. (1975) 58; *see* Uniform Comparative Fault Act § 6 (1977). Conversely, a settling defendant should not be permitted to seek contribution from others for his settlement since it is his own bargain with the plaintiff. Other defendants had nothing to do with the making of such a settlement, and ought not to be bound to contribute to it.

Paragraph (f) provides that when a plaintiff settles with one defendant, the plaintiff has the option of reducing his claim by removing the settling party's acts from his theory of injury, or alternatively, of being subject to having a final judgment reduced by the amount of the settling defendant's obligation for contribution. This provision is the corollary to paragraph (e) and is essential to make a contribution statute work fairly. The provision addresses the problem of innocent defendants facing increasingly larger liability claims as the more culpable defendants settle. While we do not think it is sound policy to permit parties who go to trial to claim contribution from settling parties, some mechanism is needed to protect the remaining defendants from facing liability for a plaintiff's claims against those with whom he has settled which exceed the amount of the settlement. Under current practice only the dollar amount of the settlement is subtracted from the entire claim, after trebling. *Flintkote Company v. Lysfjord* 246 F.2d 368, 397-98 (9 Cir. 1957). The approach we have taken is that employed by the Third Circuit in *Gomes v. Brodhurst* and other cases where a settlement was held to imply removal of all of the plaintiff's claims against the settling defendant. *See e.g., Gomes v. Brodhurst, supra*; *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190, 1191 (5th Cir. 1975); *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962); *Doyle v. United States*, 441 F. Supp. 701 (D.S.C. 1977); *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) (per Judge, now Justice, Brennan). As already noted, by giving the plaintiff the option of simply withdrawing his claims based on the acts or omissions of the settling defendant as an alternative to being subject to having a final judgment reduced by his contribution share, the proposed statute provides the plaintiff with certainty not otherwise available where certainty is needed for the approval of a class settlement. In the context of most large class action litigation over alleged price fixing, this option will have the practical effect of causing the plaintiff to remove the sales of the settling defendant from the dispute. That is the object of S. 1468, and insofar as it is appropriate to a particular case, it is a fair result.

Paragraph (g) provides that the basis for contribution shall be in accordance with the relative responsibility of each party. Many of the contribution statutes adopted in other areas employ the concept of relative fault. *E.g.*, Uniform Comparative Fault Act (1977). In many antitrust cases, however, and particularly those involving intentional price fixing, relative fault may be difficult to assess. The standard proposed by the Section is more flexible and looks to impact as well as culpability. Thus, it will permit the court to adopt a measure of contribution appropriate to each type of case. In price fixing cases, for example, where a plaintiff's damages are calculated on the basis of sales, "relative responsibility" would normally be measured by a given defendant's impact upon the plaintiff, *i.e.*, by his sales in dollars or in units, taking into account the amount of overcharge, but also taking into account the extensiveness of the violation, its duration, the transactions affected, etc. In other cases, where relative sales to the plaintiff would not be appropriate or even relevant, the standard we propose would permit the use of relative culpability or fault, if appropriate, as the measure adopted by the court. The Section considered and rejected, at least as a firm rule for all cases, the "per capita" rule used in the *Professional Beauty Supply* case on its particular facts. Although such a rule is simple of application, it does not provide the flexibility needed to achieve the fairness which we believe is required of a contribution rule in antitrust cases. The Supreme Court recently abandoned a per capita basis for contribution in admirality cases and adopted a relative fault rule:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 (1975).

Paragraph (h) makes clear that the statute is not intended to prevent some or all of the parties, through judgment sharing agreements, to agree to apportion collective liability on some specified basis in lieu of having the court make that determination as provided in the statute. The paragraph also permits the parties, where appropriate, to toll the running of the statute of limitations by agreement.

Paragraph (i) establishes an effective date for the statute. The task force originally proposed making the statute applicable at once to all pending and future actions. Numerous comments on that early draft, however, demonstrated a great concern, first that such a rule would upset settlement calculations already in progress, and second that parties could be prejudiced who had already participated in the conduct of joint defense efforts on an assumption of no contribution. Accordingly, our statutory proposal would apply only to proceedings initiated after its effective date, and that is the effect of paragraph (i). We add, however, that paragraph (i) is not intended to preclude the application to pending cases of analogous principles, which are developed by the courts as a matter of decisional law.

September 6, 1979

QUESTIONNAIRE TO MEMBERS OF THE TASK FORCE STUDYING CONTRIBUTION

1. It is easy to hypothecate facts, such as those which were before the Eighth Circuit in the *Professional Beauty Supply* case, which would work a manifest unfairness upon one or more defendants if there were no rule permitting contribution. As this questionnaire demonstrates, however, such a course may present so many practical problems that on balance the requirements of sound judicial administration may make such a rule impossible. *In your view, should contribution in some form be allowed among joint antitrust tortfeasors? What are the most compelling factors in answering that question? What limitations would you impose?*

2. The need for a rule favoring contribution among joint antitrust tortfeasors derives primarily from the existence of joint liability for the entirety of a plaintiff's damages. One means for reducing the practical problems created by contribution would be to apportion the total damage award among defendants, *i.e.*, to make each defendant liable to the plaintiff only to the extent of his own relative fault. *In your view, should each defendant in all antitrust cases be liable to plaintiff for the entire amount of the plaintiff's damage?* Bear in mind in answering that question that the vast majority of antitrust defendants are solvent, so the rule has little or no effect on the likelihood that the plaintiff will go uncompensated. *Does it matter whether the case involves a horizontal restraint as opposed to a vertical restraint? Should a distinction be drawn in the case of horizontal claims where the plaintiff's injury comprises a series of transactions, each traceable to a given defendant?*

3. A key argument against contribution is that the plaintiff may lose control of his lawsuit if defendants are permitted to add other parties, not sued by plaintiff, merely to have contribution adjudicated together with liability. A companion argument is that contribution among defendants would overly complicate antitrust litigation. *In your view, does the desire to let the plaintiff control the lawsuit outweigh the competing considerations underlying a contribution rule? Will contribution necessarily add complexity to antitrust litigation, or can contribution be dealt with separately without that result?*

4. *Does it answer the argument about the plaintiff losing control of his lawsuit to permit contribution only among parties named by the plaintiff as defendants?* In answering, bear in mind that such a rule would change the result in the *Professional Beauty Supply* case.

5. *Should contribution be allowed against a party who has settled with the plaintiff?* The opinion of the Eighth Circuit in the *Professional Beauty Supply* case expressly avoids answering that question, but the opinion suggests that a fair rule could be fashioned to deal with the settling defendant. It seems obvious that a rule permitting contribution against a settling defendant would discourage individual settlements, except in those cases where the plaintiffs' aggregate damages were traceable to individual defendants and could be deducted either by operation of law or pursuant to the settlement agreement. *What is your view? Is there a valid argument in favor of full settlements or none at all? If contribution suits can be brought against nonparties, is there any logical basis to distinguish settling defendants from other nonparties?*

6. One argument favoring contribution is that justice will be served by having defendants implead other and perhaps more guilty parties. A competing consideration, particularly in horizontal cases, will be a reluctance on the part of defendants to expand the number of files, witnesses, and transactions for plaintiff to examine. *What are your views?*

7. It can be argued, as did the Eighth Circuit, that a rule favoring contribution will fortify the deterrent effect of private litigation by increasing the likelihood that a violator will be sued. On the other hand, it can be argued that contribution will diminish the deterrent effect by causing violators to believe that they can spread the risk of violation among others. *What are your views?*

8. The Justice Department, some time ago, announced a program of encouraging violators of the antitrust laws voluntarily to make their violations known to the Justice Department in exchange for limited immunity. *Will a rule favoring contribution increase the likelihood of such individuals coming forward by permitting one company to reduce its exposure by impleading others?*

9. *If there is to be contribution among joint antitrust tortfeasors, should the contribution action be severed or tried with the primary action? Should there always be severance or only in complicated cases at the discretion of the court?*

10. A rule favoring contribution has its origins in equitable doctrines. *Would such a proceeding require a jury under the Seventh Amendment, or could it be tried to the court alone?*

11. Assume the existence of a rule favoring contribution and a trial to the same jury as tries the primary case. *Should the jury be told of the existence of contribution in advance of finding liability and damages? Will contribution increase the likelihood of a jury verdict in favor of the plaintiff on the theory that the jury would be aware that the damages were to be shared?*

12. *If there is to be contribution among some or all joint antitrust tortfeasors, on what basis should the apportionment be made, i.e., size, relative fault, sales to the plaintiff, etc.?*

13. The Supreme Court's opinion in the recently decided *Gypsum* case states that unlawful intent is not a prerequisite to liability in a civil case. *Should intent be a factor in permitting contribution?* Bear in mind in answering that question that some jurisdictions which permit contribution in negligence or strict liability cases do not permit it in cases of intentional wrongdoing.

14. With or without a rule favoring contribution, defendants often wish contractually to agree to the allocation of damages. These so-called judgment sharing agreements typically contain a provision to the effect that a settling defendant will remain liable for his share of a judgment, unless in settling he persuades the plaintiff to reduce the total claim before trebling by the amount of that defendant's share of a potential judgment under the sharing agreement. It can be argued that such agreements are void as a matter of public policy, because they contravene a strong policy favoring settlement. *In your view, should judgment sharing agreements be enforceable? Are you aware of any authority either way on this question?*

15. *Assuming the enforceability of judgment sharing agreements, should they be discoverable by the plaintiff? Should they be admissible as evidence for any purpose?*

16. *Assuming that a rule favoring contribution is to be brought about, should Congress enact legislation or should the matter be decided, case by case, by the courts as a matter of "federal common law"?* In answering that question, bear in mind a couple of competing considerations. On the one hand, it is the courts not Congress who will have to deal with the complex and numerous practical difficulties which inevitably will emerge with contribution. On the other hand, there is great need for immediate certainty in this area so that settlements can go forward.

MINORITY REPORT ON CONTRIBUTION

A. INTRODUCTION

Whether contribution rights should be authorized among antitrust co-conspirators is a policy question which cannot be properly analyzed on partisan terms. The impact of contribution claims on antitrust litigation and on settlements could adversely affect defendants as well as plaintiffs. Moreover, if the creation of such rights would merely increase litigation, federal court congestion and attorneys' fees without assuring any correlative increase in the dispensation of justice, all lawyers should find it in their ultimate self-interest to resist so imposing on an already suspicious and impatient public.

This Minority Report concludes that Congress should not at this time enact legislation creating or recognizing contribution rights among antitrust defendants or their alleged co-conspirators. The evidence of any genuine need for such legislation to protect innocent parties is scant and inconsistent, and the possibility is real that the creation of such rights would impose as much unjust hardship as it would relieve. Contribution would make partial settlements in multiple-defendant cases more difficult to achieve; would further complicate litigation already numbingly complex; and would significantly reduce antitrust defendants' exposure under the Sherman Act without any adequate justification.

As the Majority Report observes, contribution arguments vary in their compelling quality according to the nature of the offense alleged. Contribution among conspiratorial price fixers is clearly not as defensible as contribution sought by a small distributor from a large manufacturer which allegedly forced the distributor to engage in conduct deemed unreasonably anticompetitive. The federal judiciary recently has demonstrated a willingness to entertain and evaluate contribution claims in the various contexts in which they arise, and the Minority Report urges that Congress defer any action at this time and permit the courts sufficient latitude to fashion rules protective of all the legitimate interests involved. If the ultimate result is unsatisfactory and requires adjustment, Congress would be better able to draft appropriate legislation with the benefit of the courts' evaluation of these critical issues, many of which are now largely unexplored.

B. SPECIFIC OBJECTIONS TO THE PROPOSED CONTRIBUTION LEGISLATION

1. THE ADVERSE IMPACT ON SETTLEMENT NEGOTIATIONS

The most crucial provisions of the legislation proposed in the Majority Report seek to achieve two objectives: first, the immunization of settling defendants from contribution claims by nonsettling defendants; and second, the elimination from the plaintiffs' claims against the remaining defendants of all damages caused by the wrongful acts or omissions of the settling defendants. *See* sections (e) and (f) of the proposed legislation.

These provisions essentially create a mandatory sharing agreement among all the defendants, with the standards of determining each defendant's respective share loosely formulated "in accordance with the relative responsibility of each party" for the damages awarded. See section (d). Thus would the Majority Report eliminate so-called bargain settlements whereby under the current law, plaintiffs are able to offer defendants early exit from the litigation for modest consideration, while retaining the balance of their claims for the damage attributable to the settling defendants under the principles of joint and several liability applicable to Sherman Act conspiracies.

The Minority Report opposes the elimination of the so-called bargain settlement and the destruction of the negotiating flexibility now inuring to the benefit of plaintiffs and defendants alike.

For defense counsel, there are many occasions when sharing agreements cannot be recommended in a client's best interest. Similarly, the legislated sharing mandated by the statute would seriously disadvantage clients in cases where they could not afford or would not choose to continue the litigation. Such sharing commitments, when they occur, should be voluntary.

Suppose, for example, that among the defendants in a section 1 Sherman Act case is a relatively small company with a modest net worth but a substantial share of the market during the years in question. Suppose further that the company perceives a serious risk in the litigation that a conspiracy will be found, and that it will be judged one of its more important architects. The client wants to settle, and is willing to surrender virtually its entire net worth to buy peace and resume a normal business life.

As the law stands today, the plaintiff could afford to and in all likelihood would settle with such a defendant because (1) the defendant would be paying everything he realistically could and (2) the plaintiff could pursue the remaining defendants for the damages attributable to the settling defendant, minus the settlement consideration received.[1]

Under the contribution statute proposed by the Majority Report, however, the plaintiff would probably be forced to conclude that such a settlement would not be in his best interest. Even though the defendant would surrender his entire net worth to settle, the plaintiff could not afford to release a large market share for a small price. By proceeding to trial and obtaining a judgment against the small defendant, the plaintiff would recover all the damages attributed to that defendant's sales from the remaining defendants.

A law which prevents defendants eager to settle from paying out every penny of their net worth in effective admission of their liability merely because there net worth is not sufficient to cover their proportionate share of the damage caused by the conspiracy is subject to serious question. Such settlements should be encouraged, not discouraged. Nothing is gained for any party by forcing the defendant to trial. Yet the plaintiff could not rationally agree to release him, and it is doubtful whether a court in a class action properly could approve such a settlement.

Unquestionably a scenario can be drafted which arouses sympathy for the lone courageous defendant, convinced of his innocence, who is determined to have his day in court but is forced by "reality" to cave in when the guilty or less resolute cop a settlement. It is reasonable to conclude, however, that if contribution is authorized, other opportunities for abuse will arise. For example, it is not difficult to imagine that a powerful defendant with a predominant share of the market and corporate coffers adequate to finance the cost of endless defense could compel its less fortunate co-conspirators to continue in the litigation at ruinous expense and conceivably increase its market share and relative competitive strength as a consequence.

The creation of a right of contribution does not protect defendants from capriciousness; it merely shifts the power of arbitrary whimsey from the plaintiff to each of the co-conspirators. Surely any defendant must be wary of giving such power to his competitors.

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[1] It is relevant to note here that plaintiffs' right to pursue the remaining defendants for such damages is the result of defendants' several (*i.e.*, separate) liability for all damages caused by the conspiracy. To the extent that the contribution statute would eliminate such damages from plaintiffs' claims, the legislation represents a significant erosion of defendants' liability for joint torts under the Sherman Act.

Underlying the contribution proposals urged by the Majority Report is the notion that plaintiffs frequently settle first with the "bad guys" who have all the money and leave only a few "good guys" who cannot afford to satisfy a judgment or to run the risk of losing, and thus must surrender in settlement. Whether such a dilemma has been so frequent and serious a phenomenon as to require legislative solution has not been proved. Certainly such a settlement approach does not comport with traditional litigation strategy. No plaintiff wants to try his case against the most innocent or poorest defendant. Partial settlements more generally eliminate the more appealing defendants or those with assets insufficient to respond to a major judgment. Plaintiffs prefer to try their cases against the very bad, very rich defendants.

From a plaintiff's perspective, of course, the contribution provisions are particularly objectionable. The plaintiff's leverage, a direct result of the joint and several liability fundamental to recovery for Sherman Act conspiracy violations, would be substantially reduced and the bargaining strength of the most intransigent defendant proportionately increased.

Another factor likely to discourage partial settlements under the statutory scheme suggested by the Majority is the uncertainty created concerning the value of the claims the plaintiff would surrender for damages attributable to the settling defendants.

Under current law, the plaintiff knows precisely what he is giving up—the consideration received in exchange for his release. Estimating the damages for which that defendant was "relatively responsible" would be far more uncertain and hazardous. Early, prediscovery settlements would become virtually impossible. Moreover, because the fairness of any such settlement would depend on complete evaluation of the defendants' relative responsibility, all defendants would be obliged to articulate their contentions and disclose their evidence pertaining to such responsibilities prior to the finalization of any settlement agreements. That is, defendants cannot reasonably seek the benefit of eliminating from the case all damages attributable to a settling defendant without disclosing exactly what role they contend the settling defendant played in the conspiracy. That precise issue often would be the most crucial damage question to be resolved in the litigation against the nonsettling defendants.

Discovery concerning defendants' relative responsibilities in the conspiracy has advantages and disadvantages for both sides. Regardless of its strategical value, it affects the litigation in two undeniable, undesirable respects: first, it adds complexity, cost and delay; and second, it adds uncertainty. In settlement negotiations, uncertainty is anathema.

The Majority Report notwithstanding, section (f) of the proposed legislation does not relieve the uncertainty to any degree whatsoever. How is the plaintiff to know the full extent of "all claims based upon the acts or omissions" of a single, specific defendant? How are the defendants to satisfy the plaintiff's need to know such information?

Suppose, for example, that a conspiracy involved manufacturers and a general broker responsible for quoting the manufacturers' prices. The broker, who wants to settle, denies having communicated prices among the defendants or otherwise having known about them or done anything illegal. The defendants say they do not know of anything he has done. The plaintiff concludes that the broker's role was minor and accepts a nominal settlement.

Subsequently, at the damage trial, after all the remaining defendants have been found price-fixing competitors, a nonparty witness—perhaps the broker's secretary—comes forward on behalf of the defendants and testifies that the broker (1) thought the scheme up; (2) forced it on the defendants, although they did not profit from it; (3) kept the fix alive and flourishing virtually single-handedly; and (4) made millions for himself by raising the prices industry-wide on which he collected his commissions.

The plaintiff now has a real problem, and one which he hardly could have anticipated. The broker's perjury conviction is not likely to be of much consolation. To avoid the risk of making such an error, the plaintiff could be forced to refrain from settling with any defendant whose role in the conspiracy appeared to have been relatively tangential or insignificant, because unanticipated disclosures concerning such defendants' role in the conspiracy would carry the greatest potential for unpleasant surprise at the damage trial.

In *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the Supreme Court held that interpretive rules facilitating partial settlements were "most consistent with the aims and purposes of the treble damage remedy under the antitrust laws." Any rule which would frustrate such partial settlements would "promote litigation." The Court emphasized that private antitrust litigation frequently is multistate and multiparty in character, and that the likelihood of *all* defendants wanting to settle a case was remote. In that context, the Court particularly warned against any rule which would permit one or more defendants to frustrate the efforts of others to settle.

By creating uncertain and uncontrollable risk for the plaintiff, the legislation urged by the Majority Report would create a rule frustrating partial settlements and promoting litigation. Whatever criticism fairly may be made of the liabilities imposed by the antitrust laws or of the coercive nature of class actions, the undeniable fact remains that 95 percent of all major antitrust litigation today is resolved by settlement. If defendants are unfairly leveraged into such settlements, the solution lies not in frustrating settlements or promoting litigation, but in a direct reevaluation of the liabilities and risk exposure created by the antitrust laws and by the class action device. To address these issues indirectly through the creation of contribution rights will only compound the problems giving rise to the proposed legislation.

Admittedly, contribution limited to judgment defendants would have little impact on antitrust litigation or on settlements. The difficulty is in the interaction between contribution and settlements created by the Majority approach to the issue.

The Majority Report seeks to protect settling defendants at the plaintiffs' expense. Settling defendants *can* buy peace; they will be immunized against contribution claims by the plaintiffs' release. But the plaintiffs must bear the risk that the defendants they have released will turn out to have had substantially greater responsibility for the conspiracy than they had realized.

The Majority may contend that the risk is bearable and susceptible of evaluation. The point is arguable. But planitiffs properly may ask why they, rather than the settling defendants, should bear that risk. Obviously, the choice could be made to deny partial settlements any immunizing effect to permit plaintiffs to recover for all their damage, and to allow the judgment defendants to pursue settling defendants for any portion of the judgment attributable to the settling defendants' conduct.

Defendants presumably would be quick to insist that without immunity, no settlements would occur. Plaintiffs rightly can make the same argument under the statutory formulation supported by the Majority. The risk, regardless who bears it, is the same for both sides: that of losing money. If immunity is granted, the risk is the plaintiff's; if not, it belongs to the defendant. No reason has been offered as to why the plaintiff, rather than the defendant, should bear the risk in the first instance. Moreover, in either instance, in either case, uncertainty would jeopardize the parties' ability to achieve settlement. No matter which side is forced to assume the risk, the other side will, through negotiation, attempt to compel a sharing of that risk, thus frequently making settlements substantially more difficult to achieve and more expensive.

If plantiffs truly are using their leverage arising from defendants' joint and several liability in an abusive manner, defendants already have at their disposal the weapon needed to redress the imbalance. Sharing agreements, enthusiastically endorsed in the Majority Report, can provide desired protection and without creating disabling uncertainty. Defendants historically have experienced difficulties in securing such agreements, but if they are genuinely threatened now by the plaintiffs' negotiating strategy, safety is already at their fingertips.

2. CONTRIBUTION AMONG PER SE SHERMAN ACT CONSPIRATORS WOULD BE INCONSISTENT WITH PRECEDENT AND WITH DETERRENT OBJECTIVES OF THE SHERMAN ACT

Contribution should not be allowed among joint tortfeasors who have combined or conspired to commit per se offenses violative of sections 1 or 2 of the Sherman Act.

Historically viewed, contribution is an outgrowth of liberalized tort pleading rules permitting a plaintiff to join in a single action two or more defendants whose independent, separate but concurrent actions have caused the plaintiff injury. Thus, if the plaintiff has been struck by a speeding, stolen automobile driven by defendant A, whose theft was facilitated by the fact that the owner, defendant B, negligently left the keys in the car, the plaintiff will be permitted to join both defendants in a single action. If found negligent, both defendants may be found liable for all of plaintiff's damages, regardless of any differences in the degree of their negligence. However, because their conduct causing plaintiff's injury may have differed in degree, the law permits them to adjust their rights by asserting contribution claims against each other. If defendant B pays the entire judgment to the plaintiff, B may attempt to recover some or all of the judgment paid from defendant A.

Contribution has no proper application where the plaintiff's injury is the result of concerted action in pursuance of an illegal common plan and objective shared by the defendants. Where the defendants have engaged in a joint enterprise to do an unlawful act injuring the plaintiff, each defendant is and should be severally (*i.e.*, separately) liable for all the damage done by all the defendants. Under the common law, the jury would not be permitted to apportion the damages among the defendants, nor would the defendants be able to use legal process to apportion damages among themselves.[2] This principle is still law, whether applied in an antitrust or other tort context. No persuasive evidence has been adduced supporting any special contraction of tort liability for joint tortfeasors who have conspired to violate the Sherman Act.

Those who insist that joint Sherman Act tortfeasors should, in the name of "fundamental fairness," have contribution rights among themselves openly predicate their arguments on the premise that some members of an antitrust conspiracy are "less guilty" than others, and that these differences in the degree of "relative fault" among the defendants imply the necessity for contribution rights. Others argue that disparities among the conspirators in size, net worth, or benefits derived from the conspiracy somehow justify the creation of contribution rights among the conspirators.

In a conspiracy, the cooperation of each member is indispensable, no matter how small, poor or reluctant the co-conspirator may be. Consider, for example, a price fixing conspiracy. If any competitor insists on price competition, either the conspiracy will fail or the uncooperative competitor will dramatically increase its market share, to the benefit of the public paying lower prices and to the substantial detriment of the co-conspirators. The conspiracy is not likely to survive long under such circumstances. Moreover, should the uncooperative competitor disclose the existence of the conspiracy, its dissolution will be assured.

In the strictest proximate cause sense, each co-conspirator is thus indivisibly responsible for all damage caused by all members of the conspiracy. No plaintiff would have been injured had any member of the conspiracy insisted on competition or "blown the whistle" on the others. For this reason, in any antitrust conspiracy, there should not be an assignation of "relative fault." Neither a reluctance to conspire, nor insignificant size, nor mean net worth should mitigate the responsibility borne by each member of the conspiracy.

In this regard, antitrust conspiracies are significantly different from Securities Act cases in which courts have been willing to find contribution rights among joint tortfeasor defendants. Such defendants generally have not acted together pursuant to a common plan or objective, and the prohibited conduct in which they have engaged represents a wide spectrum of behavior punishable under different standards ranging from strict liability without negligence to specific intent to defraud. Accordingly, adjustment of the obligations among such joint tortfeasor defendants according to the relative nature of their conduct is consistent with the statutory scheme establishing their liability to the plaintiff. No such distinction can be drawn with respect to Sherman Act conspirators.

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[2] *See e.g.*, Everet v. Williams, Ex. 1725, reported in 1893, 9 L.Q. REV. 197. One highwayman sued another in an action on account for a share of their plunder. The bill was dismissed, the plaintiff's solicitors fined for contempt, and both parties were hanged. As Prosser notes at pp. 273-74, n.38 of his LAW OF TORTS, "in short, contribution was not allowed."

3. CONTRIBUTION WOULD SUBSTANTIALLY INCREASE THE COMPLEXITY OF ANTITRUST LITIGATION

Contribution would add complexity to antitrust litigation, particularly in conspiracy litigation involving many defendants. Defendants unable to resolve their claims against each other at the outset of the litigation would not be able to cooperate in coordinating and preparing their defense effectively. The cumulative, combined imagination of all the defendants' lawyers in identifying other third parties who might be liable in contribution under one theory or another, and the strong motivation to file such claims and thus both spread the risk and add, potentially, years of delay in resolving the cases are likely to make the cases considerably more cumbersome. The various counterclaims and crossclaims (and attendant discovery and motions) among the parties brought in on contribution claims certainly create a likelihood of substantially increased complexity. The diminished feasibility of partial settlements would leave more defendants in the litigation until the very end.

It is difficult to imagine a procedure truly separating the contribution claims from the plaintiff's action. Whenever any settlement was proposed with a defendant, the putative settling parties would want complete evaluation (through discovery) and a binding determination of the impact of such a settlement on (1) the plaintiffs' claims against the remaining defendants and (2) the nonsettling defendants' claims against the settling defendants. Otherwise, as noted above, the plaintiff would not know what he is giving up when he released the settling defendant, and could not rationally evaluate the settlement offer. For his part, the defendant would not know whether he was truly buying his peace. In class actions, no court could approve such a proposed settlement without such determinations.

If these contribution issues must be resolved or, minimally, fully explored and evaluated before settlements are likely to occur, then discovery and motions relating to the issues logically will have to precede such settlements. In short, because of its impact on settlements, contribution cannot be separately or subsequently dealt with.

Even if contribution discovery could be deferred until after trial of the plaintiff's claims, most of the witnesses involved in the main claims against the original defendants would have to be redeposed, at considerable duplicative expense and with a substantial delay in the trial of the contribution claims.

C. CONCLUSION

The Minority Report opposes the legislative creation of contribution rights among antitrust defendants despite the fact that, from time to time, specific defendants may be prejudiced unfairly by application of the principles of joint and several liability to the plaintiff's damage claims. The legislation proposed and supported by the Majority Report would, in our view, frustrate partial settlements and thus promote litigation; be inconsistent with case law precedent defining the right of contribution and with the deterrent effect of the Sherman Act; and would substantially complicate litigation which already may be fairly criticized more for the time and expense involved in its resolution than for any other failing. In voluntary sharing agreements, defendants already have an adequate protective device available. The federal judicial system has demonstrated a willingness to evaluate contribution claims in the different factual contexts in which they arise, and for the immediate future, the Minority Report urges that the courts be permitted to tailor specific rules which can fully evaluate and accommodate the different competing interests affected by contribution rights.

96TH CONGRESS
1ST SESSION

S. 1468

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

IN THE SENATE OF THE UNITED STATES

JULY 9 (legislative day, JUNE 21), 1979

Mr. BAYH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

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